S. Hrg. 101-843

LEGISLATION TO AMEND THE LANHAM TRADEMARK ACT REGARDING GRAY MARKET GOODS

HEARING

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 626

A BILL TO AMEND THE LANHAM TRADEMARK ACT REGARDING GRAY MARKET GOODS

APRIL 4, 1990

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LEGISLATION TO AMEND THE LANHAM TRADEMARK ACT REGARDING GRAY MARKET GOODS

WEDNESDAY, APRIL 4, 1990

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:06 p.m., in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senators Hatch and Grassley.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The Subcommittee on Patents, Copyrights and Trademarks will come to order.

Senator Hatch has just let us know that he's on his way. He's coming from over on the House side and will be here shortly, so we're going to proceed with our first witness, because I know you have busy schedules as well.

I am pleased to convene this hearing of the Patents, Copyrights and Trademarks Subcommittee on S. 626, the Trademark Protection Act of 1989. This bill, of which I am a cosponsor, was introduced by the ranking member of this subcommittee, Senator Hatch.

I have long supported prohibiting the importation of gray-market goods. Gray-market goods, also known as parallel imports, are foreign-made products bearing U.S. trademarks which are imported into this country without the consent of the U.S. trademark owner. These goods cost American jobs, in my judgment, and American investment and inventiveness.

Gray-market goods cause confusion to consumers who are often unaware that the product that they are buying was not produced for sale in the United States. These goods may differ in physical characteristics and frequently are not subject to the same U.S. quality control, labeling requirements, or warranties. Customers often don't realize a product is gray market until something goes wrong. Consumers may end up not getting what they think they are paying for and the reputation of the U.S. trademark owner can be severely damaged.

Gray-market imports displace U.S. goods, causing billions of dollars in losses. The gray market has been a major issue in the courts and Congress in the last few years. As a matter of fact, Senator Rudman and I have debated this issue in the Appropriations Committee, as I recall, and I believe you have won most of those times. Legislation has been introduced on both sides of the issue. The Supreme Court in a complex and complicated decision recently upheld two of three Customs Service regulations which allow the importation of gray-market goods. Thus, gray-market goods continue to be sold in the United States without the consent of the U.S. trademark owners.

I would like to commend Senator Hatch for the efforts he has made in introducing and supporting this legislation. However, I do not believe there is only one way to resolve this problem. I would be interested in hearing any suggestions the witnesses or others may have on how to reach a compromise. Consumers, trademark holders, discount merchandisers, and American workers, all of whom are represented here today, recognize the importance of the issue.

I am hopeful we can move forward in resolving this problem and would like to thank all the witnesses ahead of time. I don't think that this bill has to be the only approach that we might have to this important issue. There are many economic issues, some in my State, big merchandisers that will make an argument here about the benefit to the consumers, and our obligation in this committee is to consider legislation that protects copyrights, trademarks, and patents.

[A copy of S. 626 and the prepared statements of Senators Hatch and Grassley follow:]

II

101st CONGRESS
1st Session

S. 626

To amend the Lanham Trademark Act regarding gray market goods.

IN THE SENATE OF THE UNITED STATES

March 16 (legislative day, January 3), 1989

Mr. Hatch (for himself, Mr. DeConcini, Mr. Bradley, Ms. Mikulski, and Mr. Jeffords) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Lanham Trademark Act regarding gray market goods.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Trademark Protection Act of 1989".

(b) The Congress finds that—

(1) the importation and/or sale of gray market goods (which are, for purposes of this Act, goods manufactured abroad to which a foreign trademark is lawfully applied but which are imported into the United States without the authorization of the United States

owner of the identical or similar trademark), fundamentally violate United States trademark law;

(2) gray market goods cause confusion to consumers that trademark laws are designed to avoid because such goods, intended for sale abroad, frequently differ in their physical characteristics from goods intended for sale in the United States, such as—

(A) gray market cosmetics may contain ingredients that are either banned in the United States or are otherwise considered less desirable from the perspective of a United States consumer;

(B) gray market vehicles may not include safety devices common in vehicles manufactured for sale in the United States market;

(C) gray market batteries may have shorter lives when sold to a United States consumer simply because of delays and lack of care in transshipment; and

(D) gray market goods are frequently not subject to the same quality control, warranties provided in the United States and other features that consumers may expect from a particular trademarked good;

(3) whether or not consumers are confused by gray market goods, the importation or sale of such

goods deprives United States trademark owners of their investment in their trademark;

(4) trademarks foster vigorous competition and increased research and development and such interbrand competition ultimately benefits consumers with lower prices and increased quality and selection;

(5) the loss of goodwill occasioned by gray market goods is in violation of fundamental tenants of our trademark laws; and

(6) the importation and sale of gray market goods in the United States must be prevented to preserve the integrity of our trademark system.

(c) The Act of July 5, 1946, the Lanham Trademark Act (15 U.S.C. 1051 et seq.), is amended by adding at the end thereof the following new section:

"SEC. 52. (a) No person may import into or sell within the United States any good that is manufactured outside the United States if such good, or the label, sign, print, package, wrapper, or receptacle, bears a trademark that is identical to a trademark—

"(1) owned by a person that is a citizen of the United States or by a corporation or other entity created within the United States under the laws thereof or the laws of one of the States, the District of Columbia, one of the territories, or the Commonwealth of

Puerto Rico, without regard to the citizenship of its incorporators, shareholders, officers, or directors, and

"(2) registered by such person with the Patent and Trademark Office under the provisions of this Act,

unless such person consents to such importation or sale.

"(b) The prohibitions of subsection (a) apply regardless—

"(1) of whether the foreign manufacturer of the goods or foreign trademark owner whose trademark appears on the goods is related in any way, by corporate affiliation or otherwise, to the owner of the United States trademark;

"(2) of whether the owner of the United States trademark owns or has registered the trademark abroad; or

"(3) of whether the owner of the United States trademark has authorized the use of the trademark abroad.

"(c) The Secretary of the Treasury shall exclude from entry into the United States any good the importation of which is in violation of subsection (a), provided that the person who owns the trademark in question in the United States and who has registered that trademark with the Patent and Trademark Office files a copy of the certificate of registration for such trademark with the Secretary of the Treasury.

"(d) Any owner of a United States trademark may bring an action against the importer or seller of goods that bear identical trademarks in violation of section (a) in any Federal district court to enjoin such importation or sale and to obtain money damages and lost profits for the wrongful use of a trademark by reason of such importation or sale, under the provisions of this Act.

"(e) For purposes of this section, the term—

"(1) 'person' means any individual or entity including but not limited to any corporation or partnership; and

"(2) 'United States' means the territory comprising the 50 States, the District of Columbia, and Puerto Rico.

"(f) The exceptions to the prohibitions of section 526(a) of the Tariff Act of 1930, set forth in section 526(d) of that Act, apply to the prohibitions set forth herein.

"(g) The Secretary may promulgate regulations to implement subsection (b) but such regulations must enforce subsection (b) fully for any owner of a trademark in the United States regardless of whether—

"(1) such trademark owner or its subsidiary or other affiliate manufactures or sells goods bearing an identical or similar trademark abroad;

"(2) such trademark owner owns and/or has registered such trademark abroad; or

"(3) such trademark owner has authorized the use of such trademark abroad.".

STATEMENT OF SEN. ORRIN HATCH

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

HEARING ON THE TRADEMARK PROTECTION ACT

Thank you, Mr. Chairman, for scheduling this hearing on S. 626, the Trademark Protection Act. I appreciate the opportunity to receive testimony on what I believe is a considerable problem for United States trademark owners.

Trademarks have long played an important role in our system of intellectual property. They serve several useful purposes in our free market system. They foster competition, identify the source and quality of particular goods or services, symbolize the reputation and goodwill of the owner, and protect the public from confusion and deception. For over 40 years, U.S. trademarks have been protected by the Lanham Trademark Act, which has been surprisingly resilient to changes in world business practices. This resilience during the growth of international trade, however, has not been without some unfavorable side effects, one of which is the growing infringement of the rights of American trademark owners through the importation of gray market merchandise.

The gray market problem arises with the importation into the United States of goods bearing a trademark, familiar to the American consumer, which are brought into this country without the authorization of the U.S. trademark owner. These goods are typically not produced for sale in the United States and often fail to meet the same high quality standards imposed upon merchandise manufactured for sale here. These goods are often not subject to the same care in shipment and do not carry the usual warranties entitling the consumer to service at an authorized service center. In short, gray market goods present serious problems for American consumers.

Consumers are not the only segment of our society harmed by these goods. At a time when we are concerned about a record trade deficit and a sufficiency of meaningful manufacturing jobs for American workers, the gray market substitutes imports for U.S. goods and thus exports jobs. As a consequence, the gray market phenomenon has been strongly opposed by the great preponderance, if not all, of organized labor.

Most important, gray market goods undermine our intellectual property system. Although trademarks are supposed to prevent consumer deception and confusion, gray market goods are inherently confusing. They may fail to meet quality, health, or safety standards, and they often lack expected warranties. Furthermore, they deprive U.S. trademark owners of a fair return on their investments. The gray marketeer is able to sell the gray market good only because of the substantial investment made by the trademark owner that creates consumer acceptance of the brand. The gray marketeer profits from the sale but does not contribute to help the U.S. trademark owner recoup his or her investment. Moreover, there is consumer dissatisfaction with the gray market product, the harm to reputation and good will falls on the registered trademark owner.

This free rise enjoyed by the gray marketeer is not mitigated by the fact that the trademarked good was initially purchased from the foreign manufacturer even if that foreign entity is related to the U.S. trademark owner. Our trademark laws are territorial in nature and recognize that the good will created in a trademark in one country through time, money, and effort in that country may be very different from the good will created in another country.

While the laws not on the books do have provisions to protect the rights of U.S. trademark owners against gray market goods, they have not been enforced as written. Unfortunately, the Supreme Court's review of this issue in K Mart Corp. v. Cartier, Inc. was decided on narrow technical grounds that did not address the intellectual property or consumer protection issues. Because I view these issues to be important, I, along with the chairman, Sen. Heflin, and others, introduced this measure.

I want to point out that I do not believe that this bill will prevent any person from importing goods that otherwise meet our health and safety standards just because the goods were manufactured abroad and may be quite similar, though not identical, to goods sold in the U.S. by a U.S. trademark owner, provided that these imports do not bear the U.S. trademark owner's trademark. This right is not illusory. Many companies, for example, Sears & Roebuck, sell goods made by a U.S. trademark owner or an affiliate of a U.S. trademark owner or an affiliate of a U.S. trademark owner under their own brand or as a generic.

I believe that this legislation is an important step in protecting U.S. consumers, workers, and trademark owners. I join the chairman in welcoming the witnesses before us today, and I look forward to hearing their views on this bill.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Mr. **CHAIRMAN**. I welcome this opportunity to hear testimony concerning S. 626, which would amend the Lanham Trademark Act. After this legislation was introduced last year, I expressed my interest in studying the parallel import issue in greater detail. This hearing serves an important purpose toward that end.

At issue is a 50-year old Customs Service regulation and the Supreme Court's decision in *K mart Corp.* v. *Cartier*, the *"Copiat"* case.

I look forward to addressing the important issues of consumer protection as well as consumer choice as they relate to this legislation. I also have questions regarding in what ways this legislation would protect trademark integrity and how it would affect price competition.

Thank you Mr. Chairman.

Senator **DECONCINI**. Our first witness today will be the Senator from New Hampshire, Senator Rudman.

Senator Rudman, we welcome you. Please proceed with the summary of your statement. We will be glad to entertain the full statement and put it in the record.

STATEMENT OF HON. WARREN RUDMAN, A U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator **RUDMAN**. Thank you very much, Mr. Chairman. I am pleased to be here.

Senator **DECONCINI**. I can't say this is an impartial committee of Senator Hatch and myself, but we're trying to be here with open minds.

Senator **RUDMAN**. Yes, I was going to say, I felt I was facing a somewhat hostile panel here today. I say that in good humor. I look at all of the displays here and the graphics, and if I had realized that they were allowed, I would have probably had a couple of Mercedes automobiles brought up today and rolled into the hallway, one with the price charged in Munich and one with the price charged in Concord, NH, but that's for another time, Mr. Chairman.

Senator **DECONCINI**. Your point is well taken, nevertheless.

Senator **RUDMAN**. I've got a statement that will take about 6 or 7 minutes, and I'd like to go with that statement.

Senator **DECONCINI**. Please proceed.

Senator **RUDMAN**. Mr. Chairman, thank you for the opportunity to testify on the subject of parallel imports, often referred to as gray-market goods.

In my view parallel imports, which are genuine, trademark articles manufactured abroad and brought into this country by independent importers, provide enormous benefits to U.S. consumers. For this reason I strongly oppose S. 626, the Trademark Protection Act of 1989, introduced by my very good friend Senator Hatch, to ban the importation of parallel imports.

Mr. Chairman, as you know, section 526 of the Tariff Act of 1930 allows an American company with a registered trademark to bar the import of foreign-manufactured goods bearing that trademark. This provision was enacted to protect independent American businesses who purchase, from wholly unrelated foreign manufacturers, exclusive U.S. rights to a trademark from unfair competition by the foreign manufacturers who sold them the exclusive rights.

In recognition of the purpose of section 526, the Customs Service has for over a half a century recognized important limitations on that right to exclude. Notably, when the foreign and U.S. trademarks are owned by the same or related entities, the trademark holder may not bar the import of genuine trademarked goods by an independent importer. The Supreme Court, in *K mart Corp.* v. *Cartier*, upheld these limitations in the customs regulations implemented under section 526.

I believe the policy embodied in these long-standing regulations is sound. It prevents foreign manufacturing companies from isolating the U.S. market and discriminating against American consumers by charging substantially higher prices in the United States than they charge for the same products overseas. In contrast to section 526's purpose of protecting American business from unfair foreign competition, S. 626 would permit foreign manufacturers to gouge American consumers by squelching their American competition.

Mr. Chairman, let me repeat that gray-market goods are genuine trademarked articles. The gray market arises when overseas manufacturers implement dual pricing systems which discriminate against U.S. consumers. Foreign manufacturing companies perceive that the American market will accept higher prices. Independent American importers take advantage of this dual pricing system by purchasing such items at the world price and importing the products into this country. Even after shipping costs and customs duties, independent importers are then able to make these items available to U.S. consumers at prices significantly below those offered by the manufacturer's authorized distributors. Parallel imports thus ensure price competition for many products.

When confronted with parallel imports in the past, foreign manufacturers and their distributors and dealers have often lowered their prices.

The parallel import market saves U.S. consumers billions of dollars each year. Moreover, in some cases the gray market allows consumer access to models of an item which are available in the world market but are not sold in the United States. In addition, parallel imports play a unique role in promoting the widespread availability of desirable consumer goods. The manufacturers' U.S. subsidiaries often refuse to deal with discount retailers, relying instead on specialty outlets. In many areas of the country this refusal to deal with discount retailers would deprive many Americans of access to these goods but for the activities of the independent importers.

For these and other reasons legislation to ban gray-market imports is strongly opposed by Consumers Union, the Consumer Federation of America, and Congress Watch.

I see no reason to sacrifice these billions of dollars in consumer savings and other benefits to protect the profits of foreign manufacturing companies—which are for the most part foreign-based companies—by sanctioning their discriminatory pricing practices, nor do I believe that was the legislative intent of section 526. As Justice Brennan noted in a concurring opinion:

> The most blatant hint that Congress did not intend to extend section 526's protection to affiliates of foreign manufacturers is the provision's protectionist, almost jingoist, flavor. If a foreign manufacturer could insulate itself so easily from the com-

petition of parallel imports, much of section 526's limiting language would be pointless.

In fact, Mr. Chairman, all—and I repeat, all—of our major trading partners permit parallel imports into their countries. In Japan, for example, the Osaka District Court ruled in 1970 that the exclusive Japanese distributor and trademark owner of Parker Pens—an American product—could not bar others from importing genuine Parker pens into Japan, because parallel importation encourages free competition and improves prices and services. I'd say parenthetically, that is one of the few free market opinions I've seen come out of Japan. Why should we protect the profits of the Nikon Camera Co. when the Japanese Government refuses to protect the profits of the American maker of Parker pens?

Mr. Chairman, let me now respond to some of the charges made against gray-market imports.

First, that consumers are left without warranty protection: The root of the problem is that manufacturers have decided not to honor their own warranties for their genuinely produced goods if the goods were acquired outside the United States by independent importers. Since manufacturers are not so inclined, most vendors offering gray-market goods provide services, including warranties and return policies, which are comparable to or often better than those offered by the authorized distributor. An FTC staff report states that an FTC investigation "failed to yield sufficient evidence to substantiate claims of consumer injury resulting from the warranty practices of gray-market importers."

Second, that gray-market imports encourage a market in counterfeits: This is a ludicrous argument. Gray-market goods are genuine, trademarked goods, typically manufactured in the same factories as those goods which go through authorized distribution channels. The Lanham Act is addressed to the prevention of copying and infringement of trademarks. It does not deal with the resale of genuine trademarked goods. We should prosecute to the fullest extent of the law those selling counterfeit or infringing products. There is no connection between these and gray-market goods.

Third, that gray-market goods create consumer confusion because they are different from or inferior to authorized imports: In most cases the products are identical, or the differences are insignificant. In other cases, there are reasonable ways to deal with differences in products. In the case of automobiles, for example, Senator Inouye and I spent many hours drafting legislation to ensure that gray-market cars comply with U.S. environmental and safety standards. In the case of liquor, the Bureau of Alcohol, Tobacco and Firearms has required parallel importers, at their own expense, to have products tested at an independent laboratory. Furthermore, one could argue that a manufacturer who is marketing a good under an international trademark, but is selling an inferior product in certain countries under that trademark, is itself deceiving the consumer and violating its obligations by applying its mark to an inferior product.

Fourth, that the gray market supplants U.S. jobs: This is not a jobs issue. Gray-market goods are usually manufactured abroad in the same plants as non-gray-market goods. The only U.S. jobs we are talking about here are those of the importer and seller of the authorized import versus the importer and seller of the parallel import. In the case of American based companies, gray-market goods only arise because the American company is manufacturing abroad and, therefore, is itself exporting jobs. The Hatch bill, S. 626, similarly only deals with goods manufactured outside the United States.

To use a concrete example, in the case of cars, a gray-market Mercedes is generally competing in the U.S. market with a Mercedes sold by an authorized distributor for Daimler Benz. Both cars are manufactured in Germany. To the extent imported cars displace the jobs of American auto workers, it is a generic problem and the impact of gray-market car imports is insignificant compared to the number of jobs displaced by authorized imports.

There is no rational basis for asserting that only gray-market cars should be banned because they displace some U.S. jobs. Import controls needed to protect U.S. jobs, whether in the form of quotas or higher tariffs, should apply to the product and not distinguish by method of importation. Moreover, many gray-market products—35 mm cameras, for example—are not in competition with any domestically produced product.

Fifth, that gray-market importers are getting a free ride from expenses incurred by authorized distributors: This is simply not valid. The free-rider argument is raised with respect to three types of costs: Product development, advertising, and service. But the manufacturer who always bears the development costs, and usually the advertising and service cost, suffers no losses from the gray market—his product was purchased from him at a price he set. Incidentally, the vast majority of parallel imports perfume for example, entail no continuing service obligation and the free-rider argument does not apply in any event.

In fact, what multinational manufacturing corporations are seeking, under the guise of the free-rider argument, is protection against competition in the resale of their own product. U.S. manufacturers do not have such protection within the United States under longstanding antitrust policy and law. The original manufacturer has received the price it set for the sale of the goods in the foreign market. In this context, the free-rider argument is being used as an excuse for price gouging.

Moreover, discount retailers selling parallel imports often spend considerable sums on their own advertising. If manufacturers want to eliminate parallel imports, they simply need to price their goods uniformly throughout the world. Instead, they are asking the U.S. Congress to force the American consumer to subsidize corporate profits and are using a distorted view of the trademark laws to reach this goal.

Mr. Chairman, in 1983 Daimler Benz had 21 percent of their sales in North America, mostly in the United States, but made 48 percent of their profit here. The profit margins were 4.5 percent in West Germany, 8.9 percent in the rest of Europe, 4.8 percent in Latin America, and 26.1 percent in North America. Under those circumstances a gray market will flourish, and it did in fact flourish, and should be encouraged to do well for the benefit of American consumers.

In sum, parallel imports play a vital role in our economy by preserving price and choice competition. As such they save U.S. consumers billions of dollars each year. The reasons put forth for banning gray-market goods are insufficient and do not justify denying U.S. consumers access to such goods to the benefit of foreign manufacturing companies. Therefore, I strongly urge that the committee and the Senate reject S. 626. Thank you very much.

[Statements of Senator Rudman and Senator Chafee and a copy of a 1986 FTC report follow:]

STATEMENT OF U.S. SENATOR WARREN B. RUDMAN
before the
SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
APRIL 4, 1990

ON S.626, THE TRADEMARK PROTECTION ACT OF 1989

Mr. Chairman, thank you for the opportunity to testify today on the subject of parallel imports, often referred to as "gray market" goods.

In my view, parallel imports, which are genuine, trade-marked articles manufactured abroad and brought into this country by independent importers, provide enormous benefits to U.S. consumers. For this reason, I strongly oppose S. 626, the Trademark Protection Act of 1989, introduced by my good friend Senator Hatch, to ban the importation of parallel imports.

Mr. Chairman, as you know, Section 526 of the Tariff Act of 1930 allows an American company with a registered trademark to bar the import of foreign-manufactured goods bearing that trademark. This provision was enacted to protect independent American businesses who purchase, from wholly unrelated foreign manufacturers, exclusive U.S. rights to a trademark from unfair competition by the foreign manufacturers who sold them the exclusive rights.

In recognition of the purpose of Section 526, the Customs Service has for over half a century recognized important limitations on that right to exclude: Notably, when the foreign and U.S. trademark holders are owned by the same or related entities, the trademark holder may not bar the import of genuine trademarked goods by an independent importer. The Supreme Court, in K-Mart v. Cartier, upheld these limitations in the Customs regulations implemented under Section 526.

I believe the policy embodied in these long-standing regulations is sound. It prevents foreign manufacturing companies from isolating the U.S. market and discriminating against American consumers by charging substantially higher prices in the United States than they charge for the same products overseas. In contrast to Section 526's purpose of protecting American businesses from unfair foreign competition, S. 626 would permit foreign manufacturers to gouge American consumers by squelching their American competition.

Mr. Chairman, let me repeat that gray market goods are genuine trade-marked articles. The gray market arises when overseas manufacturers implement dual pricing systems which discriminate against U.S. consumers. Foreign manufacturing companies perceive that the American market will accept higher prices. Independent American importers take advantage of this dual pricing system by purchasing such items at the world price and importing the products into this country. Even after shipping costs and customs duties, independent importers are then able to make these items available to U.S. consumers at prices significantly below those offered by the manufacturer's authorized distributor. Parallel imports thus ensure price competition for many products. When confronted with parallel imports in the past, foreign manufacturers and their distributors and dealers have often lowered prices.

Mr. Chairman, the parallel import market saves U.S. consumers billions of dollars each year. Moreover, in some cases, the gray market allows consumer access to models of an item which are available in the world market but are not sold in the United States. In addition, parallel imports play a unique role in promoting the widespread availability of desirable consumer goods. The manufacturers' U.S. subsidiaries often refuse to deal with discount retailers, relying instead on specialty outlets. In many areas of the country, this refusal to deal with discount retailers would deprive many Americans of access to these goods but for the activities of the independent importers. For these and other reasons, legislation to ban gray market imports is strongly opposed by Consumers Union, the Consumer Federation of America, and Congress Watch.

I see no reason to sacrifice these billions of dollars in consumer savings and other benefits to protect the profits of foreign manufacturing companies -- which are for the most part foreign-based companies -- by sanctioning their discriminatory pricing policies. Nor do I believe that was the legislative intent of Section 526. As Justice Brennan noted in a concurring opinion:

> "The most blatant hint that Congress did not intend to extend Section 526's protection to affiliates of foreign manufacturers is the provision's protectionist, almost jingoist, flavor.... If a foreign manufacturer could insulate itself so easily from the competition of parallel imports, much of Section 526's limiting language would be pointless."

In fact, all our major trading partners permit parallel imports into their countries. In Japan, for example, the Osaka District Court ruled in 1970 that the exclusive Japanese distributor and trademark owner of Parker pens -- an American product -- could not bar others from importing genuine Parker pens into Japan, because parallel importation encourages free competition and improves prices and services. Why should we protect the profits of the the Nikon camera company when the Japanese government refuses to protect the profits of the American maker of Parker pens?

Mr. Chairman, let me now respond to some of the charges made against gray market imports:

1. Consumers are left without warranty protection: The root of the problem is that manufacturers have decided not to honor their own warranties for their genuinely produced goods if the goods

were acquired outside the United States by independent importers. Since manufacturers are not so inclined, most vendors offering gray market goods provide services, including warranties and return policies, which are comparable to, or often better than those offered by the authorized distributor. An FTC staff report states that an FTC investigation "..failed to yield sufficient evidence to substantiate claims of consumer injury resulting from the warranty practices of gray market importers."

2. Gray market imports encourage a market in counterfeits: This is a ludicrous argument. Gray market goods are genuine, trademarked goods, typically manufactured in the same factories as those goods which go through authorized distribution channels. The Lanham Act is addressed to the prevention of copying and infringement of trademarks. It does not deal with the resale of genuine trademarked goods. We should prosecute to the fullest extent of the law those selling counterfeit or infringing products. There is no connection between these and gray market goods.

3. Gray market goods create consumer confusion because they are different from or inferior to authorized imports: In most cases, the products are identical, or the differences are insignificant. In other cases, there are reasonable ways to deal with differences in products. In the case of automobiles, for example, Senator Inouye and I spent many hours drafting legislation to ensure that gray market cars comply with U.S. environmental and safety

standards. In the case of liquor, the Bureau of Alcohol, Tobacco and Firearms has required parallel importers, at their own expense, to have products tested at an independent laboratory. Furthermore, one could argue that a manufacturer who is marketing a good under an international trademark, but is selling an "inferior" product in certain countries under that trademark, is itself deceiving the consumer and violating its obligations by applying its mark to an "inferior" product.

4. The gray market supplants U.S. jobs: This is not a jobs issue. Gray market goods are usually manufactured abroad in the same plants as non-gray market goods. The only U.S. jobs we are talking about here are those of the importer and seller of the authorized import versus the importer and seller of the parallel import. In the case of American-based companies, gray market goods only arise because the American company is manufacturing abroad and therefore is itself exporting U.S. jobs. The Hatch bill, S. 626, similarly only deals with goods manufactured outside the United States.

To use a concrete example, in the case of cars, a gray market Mercedes is generally competing in the U.S. market with a Mercedes sold by an authorized distributor for Daimler Benz. Both cars are manufactured in Germany. To the extent imported cars displace the jobs of American auto workers, it is a generic problem and the impact of gray market car imports is insignificant compared to the number of jobs displaced by authorized imports. There is no rational basis for asserting that only gray market cars should be banned because they displace some U.S. jobs. Import controls needed to protect U.S. jobs, whether in the form of quotas or higher tariffs, should apply to the product and not distinguish by method of importation. Moreover, many gray market products -- 35 millimeter cameras for example -- are not in competition with any domestically manufactured product.

5. Gray market importers are getting a "free ride" from expenses incurred by the authorized distributor: This is simply not valid. The "free rider" argument is raised with respect to three types of costs: product development, advertising, and service. But the manufacturer who always bears the development costs, and usually the advertising and service costs, suffers no losses from the gray market -- his product was purchased from him at a price he set. Incidentally, the vast majority of parallel imports, perfume for example, entail no continuing service obligation and the free rider argument does not apply in any event.

In fact, what multinational manufacturing corporations are seeking, under the guise of the free rider argument, is protection against competition in the resale of their own products. United States manufacturers do not have such protection within the United States under long-standing antitrust policy and law. The original manufacturer has received the price it set for the sale of the goods in the foreign market. In this context, the free rider argument is being used as an excuse for price gouging.

Moreover, discount retailers selling parallel imports often spend considerable sums on their own advertising. If manufacturers want to eliminate parallel imports, they simply need to price their goods uniformly throughout the world. Instead, they are asking the United States Congress to force the American consumer to subsidize corporate profits and are using a distorted view of the trademark laws to reach this goal.

Mr. Chairman, in 1983, Daimler Benz had 21 percent of their sales in North America, mostly the United States, but made 48 percent of their profit here. The profit margins were 4.5 percent in West Germany, 8.9 percent in the rest of Europe, 4.8 percent in Latin American, but 26.1 percent in North America. Under those circumstances, a gray market will flourish, did in fact flourish, and should be encouraged to do well for the benefit of American consumers.

In sum, parallel imports play a vital role in our economy by preserving price and choice competition. As such they save U.S. consumers billions of dollars each year. The reasons put forth for banning gray market goods are insufficient and do not justify denying U.S. consumers access to such goods to the benefit of foreign manufacturing companies. Therefore, I strongly oppose S.626 and urge this Committee to reject this legislation.

STATEMENT BY
SENATOR JOHN H. CHAFEE
IN THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS OF THE SENATE COMMITTEE ON THE JUDICIARY
ON S. 626, THE TRADEMARK PROTECTION ACT OF 1989
APRIL 4, 1990

MR. CHAIRMAN, THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE THIS SUBCOMMITTEE TODAY TO PRESENT MY VIEWS ON THE ISSUE OF PARALLEL IMPORTS OR "GRAY MARKET" MERCHANDISE AND ON THE TRADEMARK PROTECTION ACT OF 1989.

WHAT ARE PARALLEL IMPORTS? THEY ARE GENUINE TRADEMARKED PRODUCTS MANUFACTURED ABROAD AND IMPORTED BY INDEPENDENT AMERICAN IMPORTERS. THESE INCLUDE SUCH TRADEMARKED GOODS AS JAPANESE CAMERAS, SWISS AND JAPANESE WATCHES, FINE FOREIGN PERFUMES, TIRES, CRYSTAL, AND ELECTRONIC PRODUCTS, WHICH ARE SOLD TO U.S. CONSUMERS AT DISCOUNTS OF 25 TO 40 PERCENT LESS THAN IDENTICAL PRODUCTS SOLD IN THE U.S. BY FOREIGN-OWNED OR CONTROLLED DISTRIBUTORS.

PARALLEL IMPORTS ARE NOT COUNTERFEITS, AS SOME GROUPS WOULD HAVE YOU BELIEVE. THESE PRODUCTS ARE MANUFACTURED IN THE SAME PLANTS AS THOSE SOLD IN THE U.S. BY SO-CALLED "AUTHORIZED DEALERS." HOWEVER, THEY ARE IMPORTED AND SOLD THROUGH DIFFERENT CHANNELS AT VASTLY DIFFERENT PRICES BY INDEPENDENT U.S. IMPORTERS ON THE OPEN MARKET ABROAD, OFTEN FROM THE FOREIGN MANUFACTURERS' AUTHORIZED DISTRIBUTORS OR DEALERS OVERSEAS.

Foreign firms see the United States as a lucrative market, where they can demand -- and get -- higher prices for their goods than anywhere else in the world. Parallel importation occurs only when these manufacturers utilize a dual pricing system, to seek significantly higher prices in the United States than elsewhere in the world.

These foreign manufacturers typically try to enforce that price discrimination by creating wholly-owned or -controlled subsidiaries in this country, by designating those companies as the exclusive "authorized" importers and distributors for their products here, and by refusing to sell to U.S. retailers who will not maintain the higher prices for the products.

The huge price difference has led to the enormous growth of "price competitive" retail stores and catalog/showroom businesses, which buy their goods from the independent importers. Such establishments -- from large chain stores to individual mom and pop neighborhood shops -- sell more than $130 billion worth of goods each year and employ hundreds of thousands of Americans. They also make an enormous investment in the goodwill of trademarks through their widespread advertising and marketing of parallel imports. Price-conscious Americans who shop at these stores save billions of dollars annually.

The difference in prices is quite remarkable. A Seiko watch, for example, which sold for $325 by an authorized dealer, is sold for $230 by one discount retailer and for $250 by another discount retailer who buy from independent importers. Similar savings can be made on imported perfumes. Here are some examples of very popular brands: On March 30th, 50 milliliters of Anne Klein Eau de Perfume was purchased from an authorized dealer for $32, the purchase price at a discount retailer in the same town was only $14.88. Quorum toilet water spray -- authorized dealer price for 50 milliliters was $23, discount retailer price (parallel import price) was only $14.58.

For many years, Customs regulations have permitted parallel imports to compete with products from foreign-owned, authorized distributors. Most courts have upheld the longstanding regulations against the attacks of authorized distributors. In fact, last year the Supreme Court, in K-Mart Corp. v. Cartier, Inc., upheld the related-party regulations as an appropriate interpretation of the Tariff Act of 1930.

Parallel markets are legal in Japan, France, Germany, and in every other major American trading partner. It would be entirely inappropriate for the U.S. Government to provide protection to foreign manufacturers whose own governments do not provide comparable protection for discriminatory pricing by American manufacturers.

THE PROPONENTS OF S. 626, WOULD HAVE YOU BELIEVE THAT PARALLEL IMPORTS UNDERMINE THE INTENT OF OUR TRADEMARK LAWS AND IN SOME WAY LEAD TO CONSUMER "DECEPTION" AND THE LOSS OF WARRANTIES ON THESE PRODUCTS TO THE CONSUMERS. THE MAGNUSON-MOSS WARRANTY ACT REQUIRES MANUFACTURERS OF CONSUMER PRODUCTS SOLD IN THE UNITED STATES TO HONOR THE WRITTEN WARRANTIES PROVIDED WITH THEIR PRODUCTS UNLESS THEY EXPLICITLY DISCLAIM THOSE WARRANTIES IN WRITING.

THE PURCHASER OF A PARALLEL IMPORT CAN ALSO LOOK TO THE DISCOUNT RETAILER FROM WHOM THE PRODUCT WAS PURCHASED FOR WARRANTY SERVICE, UNDER THE EXTENSIVE NETWORK OF EXISTING FEDERAL, STATE, AND MUNICIPAL CONSUMER PROTECTION LAWS AND AGENCIES. IN FACT, MOST RETAILERS OFFER EVEN MORE EXTENSIVE WARRANTIES THAN THE MANUFACTURERS. IN ADDITION MOST CONSUMERS HAVE ACCESS TO PRIVATE SECTOR CONSUMER HOTLINES WHO INVESTIGATE CASES INVOLVING CONSUMER FRAUD AND DECEPTION. THESE RETAILERS RELY ON REPEAT BUSINESS, AND WOULD NOT BE IN BUSINESS VERY LONG IF THEY WERE OFFERING INFERIOR QUALITY MERCHANDISE.

I FIND IT VERY INTERESTING THAT THE PROPONENTS OF THIS LEGISLATION SUGGEST THAT PARALLEL IMPORTS ARE OF INFERIOR QUALITY. FOREIGN MANUFACTURERS, WHO UTILIZE THE SAME TRADEMARK ON A PRODUCT THROUGHOUT THE WORLD, WOULD HAVE A VERY DIFFICULT TIME EXPLAINING TO THE REST OF THE WORLD WHY THE PRODUCT BEING SOLD TO THEM IS NOT THE SAME QUALITY AS THE PRODUCT THE COMPANY SELLS IN AMERICA.

Our trademark laws require all products sold in the United States under the same trademark to be of similar quality. If U.S. manufacturers were to sell products of unequal or dissimilar quality under the same trademark in different parts of the United States, they would lose the protection of our trademark laws. I do not believe these laws should provide less protection to our consumers for products purchased from foreign manufacturers than that which is provided to consumers for products made in the United States. The Trademark Protection Act of 1989 would provide additional protection to foreign manufacturers that is not provided to our manufacturers at the expense of consumers.

In 1986, at the request of the Customs Service, the staff of the Federal Trade Commission prepared a report entitled Gray Market Policy Options Facing the United States Customs Service, in response to proposed restrictions on parallel imports. As I am sure you the Committee knows, the Federal Trade Commission is the principal Federal agency charged with consumer protection and warranties. The report concludes, and I quote:

> "Given the contrasting implications of the alternative explanations for gray market goods, the inconclusive empirical information, and the additional potential costs of the Customs Service proposals noted above, the FTC staff concludes that the proposals could pose a significant risk of harming consumers rather than helping them both in the short run and the long run. The FTC staff therefore advises against changing the Customs Service gray market rules."

I BELIEVE THIS REPORT DEMONSTRATES THAT THERE ARE NO WARRANTY OR CONSUMER DECEPTION PROBLEMS WITH PARALLEL IMPORTS, AND IF THEY WERE TO DEVELOP, AMPLE AUTHORITY EXISTS TO REDRESS THEM. I WOULD ASK THAT A COPY OF THIS FTC REPORT BE INCLUDED IN THE RECORD OF THIS HEARING, FOLLOWING MY STATEMENT.

I BELIEVE THE EVIDENCE IN MY TESTIMONY AND IN THE FTC REPORT CLEARLY SHOWS THERE IS NO NEED TO EXPAND THE LANHAM TRADEMARK ACT TO PROVIDE SUBSTANTIALLY MORE PROTECTION FOR FOREIGN MANUFACTURERS THAN WE PROVIDE TO DOMESTIC PRODUCERS, AND THAT FOREIGN GOVERNMENTS DO NOT PROVIDE TO OUR MANUFACTURERS OR THEIR OWN. ONCE AGAIN, MR. CHAIRMAN, THANK YOU FOR THIS OPPORTUNITY TO TESTIFY TODAY.

Comments of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission*

on

Gray Market Policy Options Facing The United States Customs Service

October 17, 1986

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* These comments represent the views of the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission and do not necessarily represent the views of the Commission or of any individual Commissioner. The Commission, however, has authorized the submission of these comments.

I. INTRODUCTION

Under a long standing Customs Service policy, known as the "related parties" exception, products bearing genuine trademarks may be imported into the U.S. without the permission of the U.S. trademark holder, provided that the U.S. trademark holder is related to the foreign trademark holder. Such imported items are known as gray market imports. The Customs Service has proposed requiring that these imports be labeled as unauthorized imports or that all trademarks they bear be removed (demarking).

The staff of the Federal Trade Commission ("FTC" or "Commission") strongly recommends that the proposal be rejected. Even if it were established that gray market imports could cause some sort of damage in the market place, the Customs Service proposals are not the appropriate method of solving the problem. If, for example, the problem is considered to be "free riding" by unauthorized importers on the promotional efforts of authorized U.S. distributors, the dispute is about contractual obligations of the foreign manufacturers and should be resolved privately between the firms involved. If the problem is that consumers are deceived about the services associated with gray market goods, the FTC itself has jurisdiction to act under Section 5 of the FTC Act.

II. SUMMARY OF THE FTC STAFF'S COMMENTS

According to the Customs Service request for comments,[1] proponents of changing the current policy contend that these new trade restrictions would increase consumer welfare because the related party exception "discourages U.S. trademark owners from investing in marketing or servicing of trademarked products by permitting others to "free ride" on these investments." Proponents of the proposed regulations also "argue that the influx of gray market goods may deceive or confuse consumers about the source of the trademarked products and therefore about the quality or availability of warranties on those products."

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[1] Federal Register, Vol. 51, No. 116, June 17, 1986.

The FTC staff recommends against adopting either of the proposed restrictions for two reasons.

First, there are alternative private and public remedies for potential free rider or deception problems, if they exist. Even if international free rider problems do exist, firms can deal with them privately, just as they do domestically, where the government does not intervene to stop free rider problems of this sort. If gray market imports pose consumer deception problems, these problems already fall within the jurisdiction of the Commission under Section 5 of the FTC Act.[3] The Customs Service proposals are a far more intrusive solution than are more carefully targeted remedies aimed at particular consumer deception problems.

Second, there are several equally plausible theories for gray market imports. In addition to the free rider and consumer deception theories, there are other theories that imply that gray market imports involve significant consumer benefits. The available data on gray market imports are much too sketchy and anecdotal to determine reliably which theory or theories are valid. Without such information, there is insufficient reason to consider adopting government trade restrictions on gray market goods. Blanket government restrictions on gray market imports, such as those proposed by the Customs Service, are inappropriate where so many private remedies are available, where conflicting explanatory theories abound, and where there are such great uncertainties about the reliability of the empirical evidence about potential costs and benefits to consumers.

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[3] The FTC also has regulations requiring that retailers make any warranty available for consumer inspection before purchase. (See 16 CFR 702.) If no warranty is applicable on a gray market purchase, the FTC regulations could help prevent deception concerning warranty coverage. It should also be noted that the large price differences themselves might be expected to alert consumers to potential differences between authorized imports and gray market imports.

These conclusions are discussed below. The free rider and consumer deception hypotheses are treated in Section III, parts A and B. Alternative explanations are discussed in Section IV. Available empirical data are analyzed in Section V. A summary of our conclusions is presented in Section VI.

III THE FREE RIDER AND CONSUMER DECEPTION EXPLANATIONS

A Free Rider

While there are potential free rider problems at both the domestic and international levels in product distribution, they can best be addressed through private contractual agreements between manufacturers and distributors. Because distributors benefit from promotional activities and services provided by other distributors even if they do not contribute to them, manufacturers often seek to develop vertical restraints on distributors, including exclusive territories. Without such restraints, distributors may lack sufficient incentives to provide high-quality services and promotional programs and to build a brand's reputation. Because a brand's reputation is an important aid to consumer choice, inadequate investment in reputations will injure consumers. In addition, inability to establish a reputation may undermine incentives to produce high quality goods. Free rider problems may also occur if the identity of the distributor acts as a signal of product quality when consumers cannot readily ascertain quality in other ways.[3]

Because manufacturers can be expected to recognize potential free rider problems and because they are free to contract with distributors, most free rider problems could be addressed by the manufacturers' own private initiatives.[4] This applies to gray market imports as well as to domestic transshipments.[5] Consequently there is reason to doubt that gray market

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[3] T. R. Overstreet, Jr., Resale Price Maintenance: Economic Theories and Empirical Evidence. Washington, D.C.: The Federal Trade Commission, 1983, page 60.

[4] Of course, manufacturers' vertical restraints have to be consistent with U.S. antitrust laws before they can be implemented.

Even if vertical restraints eliminate all intrabrand free riding, there may still be interbrand spillover effects from one brand's promotional efforts to other brand's promotional efforts. Thus, the problem of free riding in intrabrand competition is not unique.

Even if private remedies were ineffective, the benefits of the Customs Service proposals would still have to be traded off against potential market power or other costs to consumers of government restrictions on gray market imports.

The manufacturer may also have alternative public remedies available. Recent legal research (B. Coggio, J. Gordon, and L. Coruzzi, "The History and Present Status of Gray Goods," The Trademark Reporter, Vol. 75, September/October 1985, pages 433-496.) suggests that free rider issues in gray markets could be pursued in U.S. courts under legal theories of unjust enrichment, third-party beneficiary, and/or interference with contractual relations. The Court of International Trade could also be approached on a usurpation or infringement theory.

[5] In an international context, some private remedies may be available that are not available in domestic markets. For example, the manufacturer might be able to alter its trademark, labeling, product specifications, promotions, pricing, or distribution contracts in different countries to reduce or eliminate free riding. The manufacturer could use a different trademark in each country to discourage gray market trade. The manufacturer could also discourage gray marketing by producing goods with distinguishing features for different countries.

Some additional remedies may be more effective in the international context, although they are available domestically as well. For example, the manufacturer could promote the effectiveness of its authorized distribution system in maintaining quality over long shipping distances. The manufacturer could find that its efforts to identify the distributors that sell to gray market importers and to terminate these distributors or limit imports stem largely from free rider problems. Of course, there might be unexpected circumstances that result in loopholes in private enforcement efforts, but these should disappear as new private methods of addressing these loopholes are developed.

Even if free riding might persist despite private enforcement efforts, it does not automatically follow that government should step in and enforce these private contracts as the Customs Service proposals would do. In general, private contractual relationships that benefit the contractual parties should be enforced through private efforts. In addition, the benefits of solving any residual free rider problems through government action have to be weighed against the costs of the government intervention.

B. Consumer Deception

If authorized imports and gray market goods were identical, then it seems unlikely that any risk of consumer deception would exist. Similarly, if differences between gray market and authorized imports are obvious, well known, or easily discoverable, little risk of deception exists. A risk of consumer deception may arise, however, if consumers are not aware of material differences between gray market goods and authorized imports. Such differences could conceivably arise from differences in services provided with the product, other products included in the transaction, or the principal product itself.[8] However, the FTC already has authority to deal

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shipments to them are more effective when the goods have to cross national boundaries.

[8] One potential problem with gray market goods is incompatibility for use in the U.S. In some cases, such as automobiles, these problems are addressed by changing the product once it has arrived in the U.S. In other cases, where the value of the product is not high enough to warrant such

with consumer deception problems, including deception problems involving gray market imports, and to date has not determined that there is any need to take action in this area.

Consumer confusion about the actual characteristics of gray market goods could potentially cause both immediate and longer term injury to consumers. Immediate injury would result if consumers pay for a characteristic that is not actually included in the product. Longer term injury would occur if consumers dissatisfied with gray market goods could not differentiate higher quality authorized imports. In such circumstances, consumers eventually might be unwilling to pay a price premium sufficient to cover incremental costs associated with producing or distributing the higher quality authorized import, and the higher quality product might disappear from the market.[7]

As noted in the appendix, Commission staff investigations of consumer deception in connection with gray market goods have not produced evidence of substantial systematic deception to date.

C. Relabeling and Demarking Remedies

Neither the relabeling proposal nor the demarking proposal is consistent with both the free rider and consumer deception theories for gray

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modifications, gray markets have not generally emerged. An example is cellular phones where frequency differences have discouraged gray market imports despite reportedly attractive price differences between countries. "Conversation with a Gray Marketeer," Consumer Electronics, July 1985, pages 49-50.

[7] See G. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," Quarterly Journal of Economics, August 1970, pages 488-500.

market imports. Relabeling is more relevant to consumer deception while demarking is more relevant to free riding.

If authorized imports and gray market goods have different characteristics, including services and warranties, that are the source of consumer confusion, a label that specifies the distribution channel would directly reduce this problem. Demarking would also accomplish this by alerting consumers to the likelihood of differences, but this solution could remove too much information. Trademarks serve an important function in identifying superior quality manufacturers even if they are also identified with particular distribution channels. Demarking would eliminate consumers' ability to identify superior manufacturer quality and could cause consumers to undervalue the demarked product.[8] Moreover, if deception of the type allegedly posed by gray markets is a problem, the generally preferred solution is to make sure that consumers have access to information about material differences. This is a less intrusive remedy that addresses the problem directly and does not destroy potentially valuable consumer information in the process, as disparaging relabeling or demarking might.

There are private remedies available if there are consumer deception problems. Any measure that enables consumers to distinguish between gray market and authorized imports would effectively eliminate whatever consumer deception problems might exist. Authorized distributors could affix additional trademarks indicating that their items are authorized for U.S. distribution and have been distributed in the authorized manner. Similarly, authorized distributors could inform customers of the advantages of their products, e.g., warranty terms.[9]

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[8] Similarly, relabeling might cause consumers to perceive greater quality risk than in fact exists and to undervalue the gray market product. This might occur, for example, if the label disparaged the quality of the gray market product.

Although either relabeling or demarking would have the effect of slowing or disrupting imports of gray market goods and would therefore serve to shelter the U.S. trademark holder's investments in promotion or services, only demarking directly addresses possible free rider problems. Free riding on promotion requires that consumers perceive the gray market imports to be the same as the authorized goods. This perception would be eliminated by demarking if demarking really disguised the brand. Relabeling would not remove free riding on promotions conducted by manufacturers or authorized distributors because the advertised trademark would still be apparent

IV. ALTERNATIVE EXPLANATIONS

A number of alternative explanations for gray market imports apart from free rider or consumer deception have been developed in conjunction with the debate over retail price maintenance. The recent Federal Trade Commission staff report, cited earlier,[10] reviewed several of these in addition to variations of the free rider hypothesis. Although the theoretical foundations and empirical support for these alternative explanations for gray market imports are often as extensive as those of the free rider and consumer deception explanations, the Customs Service proposals mention only the price discrimination explanation. The explanation based on lags in adjusting to exchange rate changes, in particular, has not received any attention.

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[9] Since authorized dealers will reap the benefits, there is some logic in having them bear the burden of distinguishing their product. In contrast, the Customs Service proposals put the burden on gray market suppliers and on the tax payers. If the Customs Service does become involved in policing gray market imports, an alternative to imposing a burden on tax payers would be to have authorized importers reimburse the Customs Service for the cost of the service.

[10] T. R. Overstreet, Jr., cited at footnote 3.

A. Exchange Rate Adjustment Lags

Manufacturers' output constraints,[11] strategic output and pricing considerations,[12] barriers to entry,[13] and long-run marketing considerations[14] may make foreign suppliers reluctant to change their U.S. prices in lock step with changes in exchange rates. To the extent that foreign suppliers base their decisions on these longer run considerations, their pricing decisions may differ from those of independent middlemen. The available evidence on trade reactions to changes in exchange rates suggests that lags are extremely common.[15] Some degree of lag may also arise from differences in the inventory positions of potential arbitragers[16]

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[11] If a foreign producer faces contractual (or political) obligations in its home market with respect to price or price and quantity, is producing at capacity, and faces a lag in adding new capacity, it may be forced to price discriminate against U.S. consumers. These are the conditions necessary to preclude diversion from one country to another as envisioned by R. Landes and R. Posner, "Market Power in Antitrust Cases," Harvard Law Review, Vol. 94, March 1981, pages 937-996.

[12] A foreign supplier cooperating in a cartel with U.S. producers might price discriminate against U.S. consumers to avoid disrupting the cartel. A territorial division of markets between foreign producers and U.S. firms might also promote price discrimination. Foreign producers might similarly price discriminate against U.S. consumers to avoid political action by U.S. producers directed at increasing tariffs or other trade restrictions. (The fact that trade restraints can be imposed on a country-by-country basis may remove much of the free rider problem in organizing voluntary export restraints of this type.)

Other strategic considerations might also be important. For example, efforts to establish first mover advantages in a particular geographic area may encourage geographic price discrimination. For an example of such first mover advantages, see M. T. Flaherty, "Market Share Determination in International Semiconductor Markets," Cambridge, Mass.: Harvard Business School Working Paper 1-782-04, April 1984.

[13] Barriers to entry or exit may give importing firms an incentive to dampen exchange rate changes in their pricing. When the importing county's currency is appreciating, such barriers may make importers reluctant to expand their distribution networks or to build additional capacity to meet increases in demand that may be temporary, especially when these expansion efforts involve sunk costs. When the importing country's currency is depreciating, barriers to entry or exit may make the importers reluctant to effectively abandon their home market by allowing their prices to fully reflect the exchange rate changes. The reason is that they realize that the decline in demand may be temporary and that the firm's expected present value may be higher by staying in the market during the low demand period

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because it allows them to avoid exit costs or later reentry costs. For a discussion of the role of sunk costs in determining responses to demand changes, see, for example, W. Baumol, "Contestable Markets: An Uprising in the Theory of Industry Structures," American Economic Review, Vol. 72, May 1982, pages 1-15.

[14] Some retailers of imports may be risk averse with respect to price variations. A seller facing such customers may find it attractive to offer long term supply contracts in which the seller insures the buyer against changes in exchange rates. The premium on this type of contract takes the form of higher than short run competitive prices when the buyer's currency is appreciating and lower than competitive prices when the buyer's currency is depreciating. Alternatively, there may be substantial costs associated with frequently changing prices. For instance, if retailers have printed catalogues or have customers, such as the U.S. government, that demand long term supply contracts, frequent price changes may be quite costly. Consistent with this hypothesis, D. Carlton reports that price stability is positively related to the length of association between buyers and sellers in his article "The Rigidity of Prices," American Economic Review, Vol. 26, No. 2, September 1986, pages 637-658.

Two respondents to the Commerce Department survey indicated that dampening exchange rate fluctuations was necessary to stabilize their distribution system. See question A.6.e. Gray market importers apparently cannot offer this type of price stability. Gray market importers do not participate in bids to supply GSA for this reason, for example.

[15] See, for example, R. Dornbusch, "Exchange Rate Dynamics," Journal of Political Economy, Vol 84, 1976, pages 1161-1176; F. Giavazzi and C. Wyplosz, "The Real Exchange Rate, The Current Account and the Speed of Adjustment," Essex Economics Paper #194, 1984; C. Wilson, "Anticipated Shocks and Exchange Rate Dynamics," Journal of Political Economy, Vol. 87, 1979, pages 639-647.

[16] Because of transactions costs associated with switching accounting systems (or associated with operating a second accounting system with more economically meaningful figures) or because of legal constraints, different suppliers may be operating with different inventory systems or with similar

or from differences in the speed with which firms recognize demand and cost shifts.[17]

Where suppliers either individually or collectively do not respond to exchange rate changes with prompt price adjustments, sufficient price differences may emerge to encourage gray market goods. Whether the emergence of a gray market is good, bad, or indifferent for consumers in these situations depends on the cause of the lag in the supplier's response to exchange rate changes. In many cases, however, gray markets improve consumer welfare by internationalizing markets.[18]

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systems but with different inventory levels. These differences in accounting systems may cause different suppliers to adjust to changes in exchange rates at different speeds. For example, if the authorized distributor in the U.S. is operating under a LIFO inventory system, while gray market importers are buying from foreign dealers with FIFO inventory systems, the U.S. authorized distributor would perceive higher marginal costs than the gray market importers, even though their economic opportunity costs might be identical, as long as the U.S. currency was appreciating. See J. Hilke, Firm Size and Regulatory Compliance Costs: The Case of LIFO Regulations, FTC Staff Report, 1984, for a discussion of the costs of switching accounting systems and of the cash flow implications of different accounting systems.

[17] Some gray market suppliers are professional arbitragers who focus their entire attention on responding quickly to exchange rate adjustment imperfections. Firms that are concerned with manufacturing and distribution arrangements might not be as proficient in detecting and responding to exchange rate adjustment situations. Arbitragers generally perform the role of identifying adjustment problems by executing trades that take advantage of the problem. In accord with this explanation, many gray market goods reportedly are bought and sold in several currencies before reaching the U.S. See "Camera Prices in a Shambles," New York Times, December 11, 1982, pages 41, 43. Lags in adjusting to exchange rate changes apparently occur with airline tickets, where failure of the airlines to adjust ticket prices to reflect exchange rate changes prompts the emergence of travel agencies that specialize in arbitraging these differences. See "Travel Agents Woo Clients by Offering Rebates and Other Money-Saving Deals," Wall Street Journal, September 3, 1986, page 29.

[18] In a macroeconomic context, gray markets help internationalize the market by increasing the rate of response to exchange rate changes. To the extent that such trade changes are necessary to balance financial flows, rapid trade changes help to dampen exchange rate fluctuations.

B. Distributor Collusion

Imposition of geographic restrictions by manufacturers might conceivably stem from the insistence of colluding retailers or wholesalers who are seeking to raise their margins.[19] By limiting intrabrand competition from gray market goods, across-the-board restrictions on gray market goods might therefore allow retailers or wholesalers to raise their margins for all brands in an industry. Since excessive retail or wholesale margins would reduce the demand experienced by manufacturers, manufacturers might be expected to resist retailer or wholesaler collusion. Facilitating gray market imports might be a way in which manufacturers resist distributor collusion of this type. If so, gray market imports benefit consumers by helping manufacturers to limit distributors' markups. Use of the Customs Service to police collusive agreements imposed by distributors would harm consumers and would not be an appropriate use of government funds.

C. Disciplining Exclusive Distributors[20]

A potential source of conflict between manufacturers (or their vertically integrated wholesalers) and distributors is the size of the distributor margin. A distributor with exclusive distribution rights for a brand may seek to widen its margin, e.g. in response to an unanticipated increase in market power when the dollar is appreciating. In this case, manufacturers may have incentives to discipline their distributors.[21] In some cases, manufacturing firms may find that gray markets are an efficient way to discipline their retailers.

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[19] To do this, distributors must be able to coerce the manufacturer into adopting policies that would be against its best interests absent the threat. See Overstreet, supra note 3.

[20] For discussions of this argument, see Overstreet, supra note 3, pages 25-32, and R. Steiner, "Basic Relationships in Consumer Goods Industries," Research in Marketing, Vol. 7, 1984, pages 165-208.

Since the purpose of gray market imports in this context may be to reduce market power, Customs Service restrictions on gray market imports could harm consumers by disrupting manufacturers' efforts to discipline retailers.

D. Price Discrimination

Another potential explanation for gray market goods is price discrimination against American consumers practiced by foreign manufacturers. In considering the price discrimination explanation, it is important to note that price discrimination can produce greater harm to consumers in the international context than in the domestic context. When price discrimination takes place domestically, the profits remain in the U.S. In contrast, when the price discriminating firm is foreign, the profits from the price discrimination are transferred out of the U.S. economy entirely.

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[21] Some evidence consistent with this argument has been reported in camera sales. Hasselblad camera company decided to meet gray marketing in the U.S. by offering direct consumer rebates for authorized imported cameras. See "'Gray Market' Hits Camera, Watch Sales," Advertising Age, August 15, 1983, pages 3 and 62. The use of direct rebates to consumers rather than wholesale discounts may indicate uncertainty that wholesale discounts would be fully passed along to consumers.

Porsche, another company with significant gray market imports, announced plans to abolish its traditional franchise system, although it later reconsidered its plans after being sued by the Porsche dealer association. See "Lower Price Porsche Due for U.S. in 1986," Automotive News, May 20, 1985, pages 1 and 62.

Several respondents to the Commerce Department survey noted strained relationships with retailers as a result of gray market imports. See question B.5.

Rather than charging the same prices relative to costs in all locations,[22] some firms might find it feasible to charge higher prices to U.S. consumers. For an individual firm to practice geographic price discrimination of this sort, it must be able to exercise some market power with its particular brand(s).[23] To exercise such market power, the seller would have to differentiate its brand from other brands and restrict arbitrage, including gray market imports. Even then market power would be short lived unless barriers to entry were high or entry lags were long due either to inherent industry characteristics or to government intervention (such as patents).

Geographic price discrimination also might originate through collusion among manufacturers. Collusion would limit the threat of interbrand competition to geographic price discrimination. Success would still depend, however, on entry barriers and on limiting arbitrage from gray market imports.

Another potential source of price discrimination that might give rise to gray market goods is cartelization imposed by foreign governments. Foreign governments may assist cartelization simply to transfer wealth from the importing nation to the exporting nation. Political pressure on the exporting nation to limit the volume of exports may also lead the foreign government to limit exports to the U.S. Ironically, the discrimination and emergence of the gray market in this case would stem from U.S. pressure to limit imports.[34]

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[22] See W. Landes and R. Posner, "Market Power in Antitrust Cases," Harvard Law Review, Vol 94, March 1981, pages 937-996. For a critique, see R. Schmalensee, "Another Look at Market Power in Antitrust," Cambridge, Mass.: MIT Sloan School Working Paper 1238-81, July 1981.

[23] Evidence of price discrimination in the sale of premium priced automobiles within Europe is presented in Y. Martens and V. Ginsburgh, "Product Differentiation and Price Discrimination in the European Community: The Case of Automobiles," Journal of Industrial Economics, Vol. 34, No. 2, December 1985, pages 151-166.

Whatever the source of the price discrimination, gray markets develop as independent importing firms, retailers, or even individuals purchase at lower prices abroad and sell at higher prices in the U.S. Since price discrimination may harm U.S. consumers and impose efficiency losses on the U.S. economy,[35] gray markets benefit consumers under this explanation.

Perhaps more important than the actual competition effects of gray market goods are the potential competition effects. Manufacturers are not likely to even attempt to price discriminate or collude against U.S. consumers if gray markets can rapidly undercut the discrimination or collusion. Any effort by the Customs Service to make gray marketing more difficult in the future might therefore harm consumers of goods whose prices are now constrained by the threat of gray market imports.

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[34] Japanese construction equipment manufacturers were reportedly reluctant to lower their U.S. prices for this reason while the dollar was rising. "Gray Market: Boon or Bane for Equipment Users?" Construction Equipment, September 15, 1985, pages 55-60, especially page 58.

[35] Price discrimination has a variety of potential welfare effects. The maximum loss of efficiency would occur if price discrimination is perfect, but all of the transfer to producers is consumed in enforcing the discrimination. No efficiency loss would occur if price discrimination were perfect and no resources were consumed in enforcing the discrimination. If these resources were transferred out of the country, however, U.S. consumers would be harmed without any compensating gain by U.S. producers. In this case, although there would be no efficiency loss, there would be a loss in U.S. welfare. Other varieties of price discrimination and other levels of enforcement costs or international transfers would produce intermediate levels of social loss or inefficiency in the U.S.

E. Inefficiencies Induced by Regulation

Some retailers might be more efficient in carrying out some distribution functions that are usually provided by the manufacturers. If this is the case, distribution costs could be reduced if manufacturers were able to offer their products at a lower price to retailers who would undertake such distribution functions. Such cost-related discounts, however, may be discouraged by perceptions of U.S. pricing regulations,[36] which may make the process of justifying a price difference of this type both costly and problematical.

The gray market might provide an avenue through which manufacturers with foreign operations can offer lower prices to retailers who assume more of the distribution costs.[37] If so, retailers taking advantage of gray market opportunities would be substituting some of their own services for the manufacturers' services that are not provided for gray market goods. This arrangement would not be economically attractive to gray market importers unless they could provide these services at a lower cost than the authorized distributor.[38]

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[36] The Robinson-Patman Act bars price discrimination between retailers that is not cost-justified. Several commentators have suggested that the burden of proving that price differences are cost-justified has been quite onerous. See, for example, R. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences. Washington, D.C.: American Enterprise Institute, 1970; U.S. Department of Justice, Report on the Robinson-Patman Act, 1977; and F. Scherer, Industrial Market Structure and Economic Performance, 2nd ed., Chicago: Rand McNally, 1980, page 578.

[37] To the extent this scenario is true, one would not expect foreign manufacturers to be enthusiastic about Customs Service restrictions on gray markets.

[38] It is possible that a whole class of retailers will fit into this category and that this class of retailers will be in competition with another class of retailers that require the higher cost services provided by the manufacturer. During the evolution of retailing from one type of retailer to

Where gray markets facilitate efficient wholesale pricing, Customs Service efforts to restrict gray market imports would impose efficiency losses on the U.S. economy and higher prices on U.S. consumers.

V. EMPIRICAL EVALUATION OF ALTERNATIVE EXPLANATIONS

In the previous sections, several alternative theoretical explanations for gray market imports were identified. Apart from the free rider and consumer deception theories, these theories generally suggest that consumers are likely to benefit from gray market imports. In this section, we examine the empirical support for the various theories. We find that there is insufficient basis to conclude that gray market imports are caused by free rider or consumer deception problems.

We focus on four characteristics of gray market import that shed some light on the alternative explanations[39] gray market imports were not observed in most industries before 1981; manufacturers' wholesale prices and profits often have differed across countries when gray market imports have been prominent; manufacturers' efforts to curtail gray market imports have sometimes been inconsistent or less complete than one might expect if free riding were the main cause of gray market imports; and systematic and

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another, manufacturers might be under pressure from the older form of retailer not to offer the cost-justified discount to the newer form of retailer. (This sort of conflict over retail innovations in the grocery business contributed significantly to passage of the Robinson-Patman Act. See M. Adelman's well known analysis, A&P: A Study in Price-Cost Behavior and Public Policy, Cambridge, Mass.: Harvard University Press, 1959.) See also Overstreet, supra note 3 at pages 25-32 and the case studies described on pages 106-160. Consistent with this interpretation, many retailers of gray market goods are discount or mail order firms including large retail chains that provide their own warranties and other services. See the Commerce Department survey results, page 6.

[39] See the appendix for details.

material consumer deception has not been found in the Commission's investigations of gray markets. These characteristics are discussed below.

A Lack of Gray Markets Before 1981

If gray market goods were largely a free rider or consumer deception phenomenon, appreciable levels of gray market imports would probably have been observed for many years, in particular before the rapid appreciation of the dollar that began in 1980.[80] For example, at the purely domestic level, secret sales by authorized dealers to unauthorized dealers in other geographic areas have been repeatedly reported within the U.S. where no exchange rate issues exist.[81] In addition, gray market flows not only to but from the U.S. most likely would have occurred regularly, since manufacturers and distributors would find it profitable to free ride on promotion and services offered by distributors abroad or to deceive consumers abroad as well as in the U.S. Instead, in several industries, we find no mention of gray market imports prior to 1980-81, and only limited amounts of reverse gray market flows have been observed, and these have occurred only when the dollar has declined in value.[82]

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[80] For free riding to be the dominant cause of gray market imports, but for gray marketing to be dormant until 1981, all of the gray market industries must have had free rider incentives that were just shy of the shipping and related transaction costs of establishing channels of gray market distribution.

[81] See Overstreet, supra note 3, for discussion of cases. Also see, D. Coursey, "Compaq's Canion: Micro Gray Mart Is IBM's Fault," Management Information Systems Week, April 7, 1986, pages 21, 46.

[82] A small volume of reverse gray market trade has been reported to the FTC staff by camera distributors, but it has occurred only over the last few months as the dollar has declined.

The reported lack of gray market imports before the 1980s suggests that free riding or consumer deception are unlikely to be the sole incentives underlying gray market imports in the 1980s. However, there could be an interaction between free rider incentives and lags in exchange rate adjustments. For example, a product sold in both Europe and the U.S. might be promoted with extensive national advertising only in the U.S. with costs per unit of 20 cents. If transactions costs were 25 cents per unit through gray market channels, no gray market activity would be observed. However, if a currency revaluation took place and prices in the U.S. were ten cents higher as a result, extensive gray market imports might occur. While it would be true that the revaluation triggered the gray market imports, most of the reason would be incentives to free ride. There is insufficient data to evaluate this possibility empirically.

B. Wholesale Price Differences

Wholesale price differences between countries (even after adjusting for cost differences including transportation) were apparently common in several industries when the dollar was rising. In the Commerce Department survey, several respondents acknowledged this. This may be due to adjustment lags. Neither the free rider nor the consumer deception theories predict these wholesale price and profit differences.

C. Modest Manufacturer Efforts to Curtail Gray Markets

Although some foreign manufacturers whose products are gray marketed have evidenced substantial interest in curtailing gray markets, many manufacturers have failed to take seemingly low-cost actions (for example, labeling products distributed through authorized channels) that might solve their problem.[83] Other manufacturers have taken actions that seem inconsistent with full opposition to gray market imports. Under a free rider hypothesis, manufacturers should oppose gray market imports, and ambiguous manufacturer behavior toward gray market imports should be rare. This observed ambiguous behavior is consistent with the retail discipline and distributor collusion hypotheses.

D. Lack of Substantial Systematic Consumer Deception

In the Commission staff's investigations of complaints about deception from gray market imports, insufficient evidence has been found to recommend Commission intervention under Section 5 of the F.T.C. Act. We conclude that consumer deception is not widespread enough to justify government intervention of the type contemplated by the Customs Service.

VI. SUMMARY

The Customs Service proposal to relabel or demark gray market goods is based on two conclusions: (1) government restrictions are appropriate if sellers are free riding or deceiving consumers and (2) free riding and/or deception are the reasons for gray market imports. Our analysis leads us to reject both of these conclusions. First, there are less intrusive available remedies for free riding and consumer deception problems. Second, the empirical evidence is insufficient to conclude that gray market imports are caused by free riding or consumer deception.

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[83] Failure to take more costly actions does not necessarily imply a lack of interest in stopping gray market imports, just a recognition that such efforts are too costly relative to the expected benefits.

Alternative Remedies: Even if free riding or consumer deception were found, several factors argue against the type of governmental restrictions on international trade the Customs Service has proposed. Most importantly, private remedies such as additional labeling efforts by manufacturers, changes in promotional strategies, additional private enforcement of vertical contractual agreements, or new forms of product differentiation might be expected to develop to alleviate any substantial remaining consumer confusion and free riding. This is the approach that has been taken with domestic free riding problems. In addition, alternative public remedies are also available. In particular, Section 5 of the F.T.C. Act already vests the Commission with authority to intervene where gray market imports deceive consumers.

Inconclusive Empirical Evidence: The analysis in this comment identifies a number of alternative reasons why gray market imports might occur. Some of these theories suggest that gray market goods benefit consumers. The available empirical evidence is not systematic or complete enough to enable us to accept or reject any of the theories for gray market imports. The possibility that gray markets arise because of lags in manufacturers' adjustments to exchange rate changes appears to be consistent with many of the reported characteristics of gray market imports, but some of the evidence is inconsistent even with this explanation. Therefore, although fuller empirical information might conceivably allow the Customs Service to conclude that free riding or consumer deception underlie some gray market imports, the current information is inadequate to reach such a conclusion. Given the extensive array of private remedies available, it is also questionable whether residual free rider problems could account for a substantial level of gray market activity.

In addition to these two principal reasons for rejecting the Customs Service proposals, two additional potential costs of the Customs Service proposal weigh against the proposals and require consideration. First, if the Customs Service were to restrict gray market goods, it could result in higher cost for consumers who would increasingly import gray market goods directly under Section 1526(d) of the Tariff Act of 1930, which explicitly allows importation of gray market goods for personal use.[84] Forcing consumers to do the importing directly themselves rather than allowing a firm to act for them is likely to raise consumers' costs if there are economies of scale in searching for gray market goods and importing them.[85] Second, U.S trade relationships with other countries are not necessarily robust and rational, especially in the area of import restrictions U.S. consumers, as well as consumers around the world, have a great deal to lose from disruption of free trade relationships. For this reason, government-imposed blanket trade restrictions that may invite retaliatory trade restrictions in other countries pose a risk of substantially harming consumers generally.

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[84] For a discussion, see A. Parten, "Olympus Corp. v. United States: A Study in Imperfect Parallels," unpublished, University of Virginia Law School, 1986.

[85] See, for example, "Auto 'Gray Market' Takes Off," L. A. Times, December 30, 1984, Section V, pages 2-3.
The existence of the personal exemption from gray market restrictions also raises the possibility that restrictions on gray market imports could result in efforts to circumvent the restrictions through cooperative buying arrangements. This could make the new restriction difficult to enforce without violating the intent of the personal exemption section of the statute.

Given the contrasting implications of the alternative explanations for gray market goods, the inconclusive empirical information, and the additional potential costs of the Customs Service proposals noted above, the FTC staff concludes that the proposals could pose a significant risk of harming consumers rather than helping them both in the short run and the long run. The FTC staff therefore advises against changing the Customs Service gray market rules.

APPENDIX A. THE NATURE AND EXTENT OF THE GRAY MARKET

Empirical information on the nature and extent of the gray market is quite limited. The most widely cited source of data on gray markets is the Department of Commerce survey of 1984.[1] Scattered news reports and public releases by firms involved in importing gray market goods or in opposing gray market imports make up the rest of the publicly available information. On the basis of these largely anecdotal sources and the Commission's own investigations of alleged consumer deception in gray markets, the following are characteristics reported about gray market imports:

1. The volume of gray market imports into the United States has increased and decreased with the relative value of the dollar[2]. Few gray market goods were imported into the United States prior to 1981, except for photographic equipment which appeared in substantial quantities beginning in

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[1] "Economic Effects of Parallel Imports: A Preliminary Analysis," U.S. Department of Commerce, Patent and Trademark Office, 1985.

[2] The Commerce Department survey, *supra* note 1, asked for the time path of gray market imports. Respondents indicated that gray market goods increased after 1981 while the value of the dollar was increasing. This pattern has also been noted in numerous press accounts. For example, "The $7 Billion Gray Market: Where It Stops, Nobody Knows," *Business Week*, April 15, 1985, pages 86-87; "'Gray Market' Fight Isn't Black and White," *The National Law Journal*, October 28, 1985, pages 1,22-23; "'Gray Market' in Camera Imports Starts to Undercut Official Dealers," *Wall Street Journal*, April 1, 1982, page 29; "Importers See Red Over Gray Market," *Advertising Age*, July 21, 1980, page 57; and "Gray Market: Boon or Bane for Equipment Users?" *Construction Equipment*, September 15, 1985, pages 55-60. Active gray markets for construction and other industrial equipment did not appear until fairly late in the rise of the dollar in the 1980s. See "Gray Market Expands to Industrial Goods," *Inc.*, July 1985, page 22.

Some firms involved in gray market imports of construction equipment into the U.S. were active in 1970s in gray market exports from the U.S. to Japan. See "Gray Market: Boon or Bane for Equipment Users?" *Construction Equipment*, September 15, 1985, pages 55-60.

the mid 1970s.[3] Since the value of the dollar began falling against other major currencies in 1985, gray market imports have declined significantly.[4]

2. The brands involved in gray markets are usually premium brands that are among the most highly differentiated in their category in the United States[5]. Part of this differentiation has been accomplished through media

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[3] Several respondents to the Commerce Department survey indicated that no gray market activity was known to them prior to the increase in the value of the dollar in the 1980s. For cameras, Pentax and Hasselblad found no gray market activity until after 1980. Nikon experienced gray market activity earlier. The earlier advent of gray markets in cameras may have stemmed from a tactical shift in the distribution policies of Canon, a Japanese manufacturer. In the mid-1970s, Canon discontinued using Bell and Howell as its U.S. distributor and simultaneously undertook a major expansion of output in Japan. This apparently resulted in expanded output by several Japanese manufacturers (because of their concern about maintaining their market shares) and substantial pressure on Japanese distributors to increase Japanese sales. This may have reduced prices in Japan generally and led to gray market exports before the currency revaluations of the 1980s. See "'Gray Market' in Camera Imports Starts to Undercut Official Dealers," New York Times, December 11, 1982, pages L41 and L43.

[4] See, for example, "Dollar's Drop Drubs Gray Marketeers," Washington Post, May 4, 1986, page F3, and "Is the Gray Market Dead or Alive?," Modern Tire Dealer, July 1985, pages 17-18. In fact, many gray market automobile importers have reportedly exited. See "Dollar Dulls Auto Gray Market," Journal of Commerce and Commercial, March 4, 1986, page 1A(2).

[5] That is, the brands have no very close substitutes. For a recent discussion, see R. Caves and P. Williamson, "What Is Product Differentiation, Really?," Journal of Industrial Economics, 24:2, December, 1985, pages 113-132. Reported gray market activity has been particularly intense in brands that have the highest prices. See generally, "A Cheaper Way to Get the Goods," Insight, October 21, 1985, pages 56-58. The respondents to the Commerce Department survey emphasized these products too. See question A.1. for a listing.

Although gray market goods have predominantly been highly differentiated premium products, gray markets have also arisen in some industrial products where an unexpected supply situation in one country has developed. This reportedly occurred for computer chips and construction equipment in 1985. In both cases, unanticipated declines in world demand were followed by growth in U.S. demand relative to foreign demand. See "The $7 Billion Gray Market: Where It Stops, Nobody Knows," Business Week, April 15, 1985, pages 86-87, and "Gray Market: Boon or Bane for Equipment Users?" Construction Equipment, September 15, 1985, pages 55-60.

advertising by the manufacturers.[6] The value of gray market imports has apparently been greatest in the premium-priced automobile, watch, and camera equipment businesses. Gray market imports are also commonly reported in premium tires, perfumes, ski equipment, wines, and consumer electronics.

3. U.S. wholesale prices for products with significant gray market activity were commonly substantially higher than comparable foreign wholesale prices when the dollar was appreciating[7]. Cost differences do not appear sufficient to explain all these wholesale price differences.[8] However,

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[6] See the Commerce Department survey results, question B.3. Camera, perfume, and ski boot respondents reported advertising and promotion costs as 15% to 30% of sales. Consumer electronics respondents reported advertising costs of 5% of sales.

[7] Several firms replying to the Commerce Department survey confirmed charging different prices in different countries. None of the respondents denied following this practice. See question 6.d for these responses. Nikon, Nordica, Minolta, and Evinrude each noted wide differences in the prices that they charge at the wholesale level at least partly based on demand differences. K-Mart responded that price differences were the primary incentive for its gray market imports.

At the request of F.T.C. staff, buyers for the U.S. Army and Air Force Exchange Service reported data on the wholesale prices paid by their buyers in different countries for products that have been subject to gray marketing. Although the number of observations is limited, the data confirm that wholesale prices did differ across countries in several instances. The data are listed in Appendix A.

Numerous press accounts note large wholesale price differences across national boundaries. See, for example, "The Gray Market: Where a $200 Watch Can Be Bought for $140," Washington Post, December 16, 1985, pages L1-L2; "The $7 Billion Gray Market: Where It Stops, Nobody Knows," Business Week, April 15, 1986, pages 86-87; "What Price Mercedes?" Forbes, August 27, 1984, pages 134, 136, 139.

When some foreign manufacturers have equalized prices across areas, gray markets have largely disappeared. For example, Michelin tires were gray marketed until it recently equalized prices across areas. Since this pricing action, gray markets have been nearly eliminated. See "Is the Gray Market Alive or Dead?" Modern Tire Dealer, July 1986, pages 17-18.

[8] Consistent with this interpretation, foreign manufacturers were reported to have earned unusually high profits by not lowering their U.S. wholesale prices as the dollar rose in value. See "Watching From Abroad with Mixed Emotions," Fortune, August 19, 1985, page 32. Wholesale prices have also reportedly differed by enough to make it profitable to buy at retail in Europe for export to the U.S. See "The $7 Billion Gray Market: Where It Stops, Nobody Knows," Business Week, April 15, 1986, pages 86-87.

With the recent drop in the value of the dollar, Japanese firms, in particular, are reportedly taking much lower profit margins, transferring production to other countries, or making extra cost cutting efforts in order sometimes wholesale prices were similar, but U.S. retail margins were higher.[9]

4. Manufacturers have engaged in varying degrees of private efforts to curtail gray market imports[10] under the current Customs Service policy. While some manufacturers have made efforts to discourage gray market trade, several available private remedies, such as labeling authorized imports

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to protect their market shares in the U.S. The stature of U.S. competitors appears to play a role in these decisions. For example, Fuji has apparently raised its prices for film across the world except in the U.S. where Kodak has its most dominant position. See "As the Japanese Yen Grows Stronger, Why Aren't Import Prices Soaring?" Wall Street Journal, July 30, 1986, page 21.

[9] Some veteran gray market importers attribute gray marketing to higher distributor profits for authorized dealers as well as to currency fluctuations. See "Conversation with a Gray Marketeer," Consumer Electronics, July 1985, pages 49-50. Some of the data supplied for the Commerce Department survey showed both higher wholesale and higher retail margins in the U.S. See question A.6.b

[10] Some manufacturers present a somewhat split policy on gray market goods. For example, although Mercedes makes efforts to discourage gray market goods through publicity and contacts with financial and insurance institutions, it provides a delivery center, factory tours, and dining facilities for U.S. citizens buying their cars at the factory. See "A Cheaper Way to Get the Goods," Insight, October 21, 1983, pages 56-58. Camera manufacturers reportedly undertook substantial enforcement efforts to find and dismiss dealers in Hong Kong who sold to the U.S. gray market during the mid-1970s. Since then, supply sources have shifted to Europe. See "The $7 Billion Gray Market: Where It Stops, Nobody Knows," Business Week, April 15, 1986, pages 86-87. At the same time, the presence of various export licensing requirements in Japan suggests that Japanese manufacturers who were intent on monitoring gray market exports from Japan could do so. See "Conversation with a Gray Marketeer," Consumer Electronics, July 1985, pages 49-50.

Few efforts by authorized importers or manufacturers to use labels to distinguish authorized imports from gray market imports were reported in the Commerce Department survey of gray market practices. (See responses to question B.13 in the survey.) However, some camera manufacturers do require that retailer advertisements affirmatively state that the product is guaranteed by the manufacturer in order to be eligible for cooperative advertising incentives. See Vivitar Corp. vs United States, 593 F. Supp. 420, 435 (C.I.T. 1984); "'Gray Market' Fight Isn't Black and White," National Law Journal, October 28, 1985, pages 1, 22 and 23; and "'Gray Market in Camera Imports Starts to Undercut Official Dealers," Wall Street Journal, April 1, 1982, page 29. Pirelli tire company also reportedly decided to delete all of the DOT Codes from tires not designated for distribution in the U.S. See "Pirelli Ends DOT Code on Future non-USA Tires," Tire Review, November 1985, page 19.

or using different trademarks in different countries have not been widely utilized.

5. Imported gray market products are usually physically close substitutes for the authorized imported products.[11] The principal differences involve services sold with the product[12], particularly warranties,[13] although slight model differences are common.[14]

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[11] An exception is European automobiles. The automobiles available in Europe lack emission control devices required in the U.S. as well as several required safety features. All automobiles imported into the U.S. have to be refitted to include these items. Even with these adjustments, which usually cost several thousand dollars, European wholesale prices were considerably lower than U.S. wholesale prices during the early to middle 1980s. See "What Price Mercedes?" *Forbes*, August 27, 1984, pages 134, 136, and 139.

Claims concerning deterioration of quality in unauthorized distribution channels have been made for several gray market products including wines, ski equipment, batteries, records, perfumes, and photographic equipment. See the Department of Commerce survey, question B.5.

[12] The most common bundling is with warranty or repair work. Submissions to the Commerce Department survey included a number of consumer complaints indicating that some consumers apparently assumed that warranty service was included when it was not. Consumer complaints received by the Better Business Bureau of Metropolitan New York, the center of U.S. gray market activity, have also focused on repair problems. Complaints of this type have involved calculators, typewriters, cameras, electronic keyboards, and electronic toys. See "No Guarantees for Guarantees in Gray Market," *Wall Street Journal*, February 5, 1985, page 33.

Consumer Reports recently reported that retailers stocking gray market photography goods now routinely offer products both with and without manufacturer warranties at different prices. See the May 1985 issue, pages 300-301. In this way consumers have greater choice with gray market goods in the market. The same article also reported that a convention has emerged in advertising under which authorized imports are advertised as "U.S. warranty included" while gray market goods do not carry this message. Gray market retailers commonly offer their own warranties to replace the manufacturer warranty. See also "The $7 Billion Gray Market: Where It Stops, Nobody Knows," *Business Week*, April 15, 1985, pages 85-86.

[13] Retail chains that participate substantially in the gray market supply their own services and warranties to substitute for those of the manufacturers that are not available on gray market goods. See the Commerce Department survey, *supra* note 1.

[14] Some automobile gray markets, in particular, are attributed to manufacturers' decisions not to sell a particular configuration in the U.S. See "Warranty War Next for Automobile Marketers?" *Advertising Age*, November 11, 1985, page 40.

6. Sufficient evidence of systematic nondisclosure of material facts, which might justify Commission intervention under its Section 5 authority, has not been found by the Commission staff in any of the investigations of gray market goods initiated by the Commission in the 1980s. Although authorized importers have shared with us anecdotal evidence of consumer injury allegedly resulting from various practices associated with the sale of gray market goods, there was insufficient evidence of a systematic problem to warrant Commission action. In addition, investigations of importers of gray market products conducted by the FTC's Division of Marketing Practices in 1983 and 1984 failed to yield sufficient evidence to substantiate claims of consumer injury resulting from the warranty practices of gray market importers.

Appendix B
Wholesale** and Retail* Prices of Some Gray Market Goods

				Prices Paid by Post Exchange**		
Product	Date	Authorized Retailer Price*	Gray Market Price*	U.S. Wholesale	Japan Wholesale	W. Germany Wholesale
Gucci						
Watch	9/86			167.88	167.88	167.88
(9000)	9/85	295.00	145.00			
Opium						
Perfume	9/86			37.30		21.00
(1/4 oz.)	9/85	32.50	30.00	36.00		21.00
	9/83			30.00		
Minolta						
Rangefin.	9/86			discont.	99.13	
(Frdm.II)	9/85	169.99	69.99	94.95	66.09	
Nikon						
FE-2	9/86			discont.	274.99	
(body)	9/85	239.00	209.00	discont.	179.59	
	9/83			276.84	172.55	
Seiko Wt.						
(522118)	9/86			121.00		
(522048)	9/85			121.00		
(xux06)	9/83			110.00	110.00	110.00
Olympus						
OM4	9/86				385.88	
(body)	9/85	315.00	289.00		294.00	

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* Retail prices reported for the Washington area by Insight magazine, "A Cheaper Way to Get the Goods," October 21, 1985, pages 56-58.

** Price paid by buyers for the Army and Air Force Exchange Service. These buyers purchase goods in each country for use in the exchange posts at U.S. military bases in each country. They report the prices that they have paid to the Dallas headquarters of the exchange service. Buyers are instructed not to purchase any goods that they have reason to believe are gray market goods. They purchase exclusively from local authorized distributors in each country. The exchange service undertakes no international trading of its own. Data were made available by G.L. Haynie, Deputy Chief, Public Affairs, Headquarters Army and Air Force Exchange Service, Dallas, Texas.

Senator DeConcini. Thank you, Senator Rudman.

I will yield to my ranking member, Senator Hatch, who is the author of the bill and a very active member on this committee.

Senator Hatch.

Senator Hatch. Well, thank you, Senator DeConcini. I am interested in what the witnesses have to say today, and certainly my colleague Senator Rudman is very bright and very knowledgeable in many of these areas. So we appreciate having your testimony here today.

I would just ask that my statement be placed in the record so that we can listen to the witnesses.

Senator DeConcini. Very good.

Senator Rudman, if you need to be excused, I understand. We have no questions.

Senator Rudman. Mr. Chairman, I thank you very much.

I apologize to my colleague, Congressman Cardin. Unfortunately I do have another appointment, but I do appreciate the opportunity to appear before this committee.

Senator DeConcini. Thank you for joining us.

Senator Chafee has notified us that he cannot be here, but he has a statement in opposition to the bill, as yours is, and it will appear in the record following yours.

Senator Rudman. Thank you very much.

Senator Hatch. I'd also like to welcome Congressman Cardin and tell him how much we appreciate having the benefit of his testimony today as well.

Senator DeConcini. Yes, we thank you for being with us, the Congressman from Maryland who has introduced a similar bill to the one that Senator Hatch and I have introduced here. We thank you for coming over and testifying. You may proceed.

Senator Hatch. Now that Senator Rudman is gone, we expect a very good rebuttal.

STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. REPRESENTATIVE FROM THE STATE OF MARYLAND

Mr. Cardin. Thank you, Mr. Chairman, Senator Hatch, it's a real pleasure for me to be here and I thank you very much for allowing me to testify in rebuttal to Senator Rudman.

As you pointed out, I am the sponsor of the companion bill in the House, H.R. 3484, which has 32 of my colleagues as cosponsors. With your permission I would like to introduce my entire statement and just highlight some of the points I think are worthy of mentioning, particularly in light of some of the comments that have been made by Senator Rudman.

Senator DeConcini. Your full statement will appear in the record.

Mr. Cardin. Thank you, Mr. Chairman.

As you all know, gray-market products all bear trademarks familiar to most American consumers. But the problem is, it's not the product that the American consumer thought that he or she was buying. Senator Rudman mentioned one or two products, but the truth of the matter is there are many gray-market products, many of which are before you today in this committee room. They range from cosmetics to cameras, from outboard motors to food products, and all in one way or the other deceive the American consumer.

Let me try to point that out in one gray-market product, that is Johnson's baby shampoo—I think most of us are familiar with Johnson's baby shampoo; I don't want to give an advertisement to Johnson's, but it was the product that I used for my children when I gave them their baths when they were young, and the main reason I did was because I wasn't very talented in doing it, and I always got a little bit of the shampoo in their eyes, and they didn't cry. I was very happy with the product from that point of view—this is the product, but quite frankly if I would have gone to the store and picked up this product, I would have bought it thinking it was the Johnson's that I am familiar with.

The truth of the matter is, it's not. It was made for Brazil. You can tell the difference if you had two bottles next to each other. But shampoos aren't displayed in this way. Only one would be on the shelf. This product is different. The ingredients are different for Brazil, the water is different and it's a different product, although it is authorized by Johnson for sale in Brazil.

Gray-market products, as has been pointed out, will contain a legal trademark, but the trademark was issued for a market other than the American market. Now, who is being hurt? Well, first the American consumers are being hurt. They're getting a different product, they wanted a product they relied on, that they have used in the past, and they're not getting the product they thought they were getting.

The warranty issue—when you buy a product that you believe carries a warranty that is going to be recognized in this country, and find out that you do not have that warranty, you have been hurt and you have been misled. The trademark should protect American consumers against that particular deceit.

It undermines the intellectual property rights that we have in this country. People spend a lot of dollars protecting their trademarks, and by having gray-market products here competing, the trademark holder is hurt by gray-market products. It costs American jobs. I heard Senator Rudman talk about the fact that it doesn't cost American jobs. It does, and I think you'll hear today from organized labor and business here in this country, indicating the fact that jobs are lost because of gray market.

What is so frustrating about the loss of these jobs is that American consumers thought they were buying products made by American workers, when in fact they find that they bought a product that was not. So here we have a situation where the American consumer preferred a product manufactured here and is getting a product that is not manufactured here. That is costing us jobs here in the United States, and it also acts as an incentive or cover for counterfeit products.

I also have the counterfeit product here. This was not made at all by Johnson's. It looks very similar to the real one. We all know how many counterfeit products are now on the streets. The truth is, the fact that gray-market products are available acts as a way of camouflaging the counterfeit product. If we had control over gray-market products it would be a lot easier for us to root out those people that are in the business of producing and selling counterfeit trademark products here in the United States.

What does our legislation do? Our legislation amends the Lanham Trademark Act, it clarifies the Supreme Court *K mart* decision. I noticed the chairman's interpretation of that decision, but clearly there is some confusion, at least by the courts, as to the interpretation of section 526 in the Tariff Act. Our legislation places the protection in the Lanham Trademark Act where I believe it should be and prohibits the importation of gray-market products. It's a very simple bill. It just says that those products can be imported into the United States without the U.S. trademark affixed to the product. It's easily enforceable by the Customs people.

But let me say what it does not do, despite what some people might say. It does not impede fair trade and free trade. All you need to do is take the trademark off the product, and many companies here in the United States do just that. They import products, take the trademark off, and sell it under their own name. That's perfectly permissible under the legislation that we have filed. Some of the things Senator Rudman said about the pricing—you know, we have antitrust laws in this country that cover many of the points that the Senator mentioned, and the market, if you look at the market prices on gray-market products versus the genuine trademark product here in this country, you'll find that the market prices do not bear out what the Senator has said. There is very close pricing between these products, there is competition and there is not a more expensive product as a result of the gray-market product not being in competition. That's just not the case.

In conclusion let me say that I think we've taken a balanced approach. You have suggested what kind of compromises can be reached. I think this bill is a compromise because the bill indicates that all we're asking is, don't bring a trademarked product that is authorized for a different market into the United States. If you want to bring the product in, bring it in but take the trademark off and let it compete without the benefit of the U.S. trademark that has been developed for the U.S. market. I think that is a balanced approach and I urge favorable consideration by the committee.

[The prepared statements of Messrs. Cardin, Frenzel, and Chandler follow:]

BENJAMIN L. CARDIN
3d District, Maryland

COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON HEALTH
SUBCOMMITTEE ON SOCIAL SECURITY

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STATEMENT OF
REPRESENTATIVE BENJAMIN L. CARDIN
THE CONSUMER AWARENESS AND TRADEMARK PROTECTION ACT
WEDNESDAY, APRIL 4, 1990

Thank you very much for giving me the opportunity to testify on Senator Hatch's bill, S. 626, the Consumer Awareness and Trademark Protection Act. As you may know, I introduced the companion legislation in the House of Representatives last fall.

Gray market goods bear trademarks that are familiar to most American consumers. They are manufactured for sale abroad and are not intended for sale in the United States. Although gray market goods are not counterfeit in the sense that they are manufactured by someone who has the legal right to apply the trademark abroad, their importation results in the serious deception of consumers, loss of U.S. jobs, the undermining of our intellectual property laws and the infringement of the rights of American trademark owners.

Because gray market goods were intended for sale abroad, they commonly differ from their U.S. counterparts, and yet consumers are almost never made aware of this fact, finding out only when they get them home that the merchandise fails to meet American standards for quality, safety, and service. Documented consumer problems range from non-conforming merchandise and illegal ingredients to the lack of factory authorized warranty repair and other after-purchase services.

The American consumer deserves more. When a father goes to the store to buy Johnson's Baby Shampoo for his little boy he is assuming that he will get the same product he's bought time and time before. American consumers buy products they are familiar with. Most people stay with a product as long as they are satisfied with it. If, all of a sudden, the Johnson's Baby Shampoo isn't as yellow or as thick as it normally is when this father lathers his little boy's hair, he may decide that he cannot count on Johnson's Baby Shampoo to be the same everytime he uses it. In actuality, he may have gotten the Johnson's Baby Shampoo made in Brazil for Brazilians who have a different quality of water than that in the U.S.

Consumers rely on trademarks to distinguish among similar goods supplied by different producers. If all of a sudden trademarks have new meanings, that Johnson's Baby Shampoo no longer means "no more tears" that Sunlight no longer gets dishes "sparkling clean" and that Zest fails to get one "zestfully clean," we are diminishing the value of the innovation, hard work, and money that went into developing the product.

The American consumer is not the only segment of our society that is harmed by the gray market. In many cases American consumers think that they are buying American made products only to later find that this is not the case. At a time when we are concerned about a record trade deficit and meaningful manufacturing jobs for American workers, the gray market substitutes imports for U.S. goods and exports jobs. As a consequence, the gray market phenomenon has been strongly opposed by a majority, if not all, of organized labor as well as, business and consumer groups.

Gray market goods undermine our intellectual property system. Although one of the fundamental purposes of trademarks is to prevent consumer deception and confusion, gray market goods have just the opposite effect. As demonstrated by the shampoo example, gray market goods often differ physically from their legitimate counterparts. Even where gray market and authorized goods are essentially identical, gray market goods often lack the quality and warranties that the consumer expects to receive in conjunction with the trademarked item.

Gray marketeers undercut the U.S. trademark owners' efforts to assure quality and consistency, and free ride on the U.S. trademark owners' promotion, research and development and other expenditures. The gray market seriously damages individual trademarks as well as the integrity of our U.S. trademark system as a whole. The trademark enables healthy and effective competition in the marketplace. When you throw gray market goods into this system, the consumer can no longer effectively identify products in an informed way.

Our laws, more specifically Section 526 of the Tariff Act, contain provisions to protect U.S. trademark owners against the importation and sale in the United States of gray market goods. They also provide for a private right of action and government enforcement. The recent Supreme Court decision in K Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988) did not go far enough in requiring Customs to enforce Section 526 to stop all gray market imports. For years these laws were fully enforced by the U.S. Customs Service, but it seems that the Administration has not acted beyond defending the Supreme Court challenge to the regulations. No one is quite sure where the Administration is on this issue. It is clear that congressional action is needed. Therefore, I have joined with thirty two of my colleagues in the House in sponsoring a bill to put a halt to the gray market.

The Consumer Awareness and Trademark Protection Act would amend the Lanham Trademark Act to provide that no person may import into or sell within the United States any good that is manufactured outside the United States if that good bears a trademark that is identical to a trademark owned and properly registered by a person, corporation, or other entity, unless the United States trademark owner consents to such sale or importation.

This prohibition would apply regardless of whether the foreign manufacturer of the goods or foreign trademark owner whose trademark appears on the goods is related in any way to the owner of the United States trademark. The prohibition would also apply regardless of whether the owner of the United States trademark owner has registered the trademark or has authorized the use of the trademark abroad.

By enacting this legislation Congress will reduce unjust encroachments on trademark owners' rights, such as disincentives to investments resulting from free-riding gray market goods, consumer concerns based on unserviceable and inferior products, and litigation expenses incurred by trademark owners to protect their trademarks against gray market goods.

It should be emphasized that this legislation is not an attempt to embargo merchandise or to impede the free flow of goods from abroad. The bill does not prevent any person from importing goods that otherwise meet our health and safety standards provided the imports do not bear an unauthorized U.S. trademark.

Finally, the purpose of the proposed legislation is to provide a balanced and equitable solution to the very serious challenge to our intellectual property system posed by gray market imports. In the end, enforcement of the laws to prevent gray market imports will reduce consumer deception, enhance U.S. employment, and ensure that entrepreneurs earn a sufficient return on their investment, enabling them to continue to bring the maximum number of products and services to the U.S. market. This fully reflects what has been and should continue to be the essence of our intellectual property system.

Testimony by Congressman Bill Frenzel on S.626
Senate Judiciary Committee,
Subcommittee on Patents, Copyrights & Trademarks
April 4, 1990

Mr. Chairman, I appreciate this opportunity to testify before your Subcommittee on S.626. Regretfully, I strongly oppose this bill.

I am a co-sponsor of HR 771, sponsored by Congressman Chandler, which would codify Customs regulations regarding the importation of parallel imports. As such, I am a supporter of parallel imports and would oppose bills such as this one which restrict them.

Consistent with the Lanham Act, Customs regulations state that parallel imports are not trademark violations when the US trademark holder is affiliated with the foreign trademark holder and the goods are genuine.

Parallel imports have created a market for many products which would not have been purchased at the usual higher price charged by an authorized distributor. As a free trader who welcomes competition, I have always supported lower prices for consumers. The Chandler bill would continue to promote competitive pricing; S.626 would not.

Opponents state that parallel importers do not have the advertising and marketing costs they incur. They also allege that many parallel imports produced for foreign markets have different standards or formul that do not match those produced for the US market. That could cause a product to lose some of its integrity and possibly some of its customers. Also, some have charged that parallel importers do not offer the same guarantees and warranties as the US trademark holder.

I believe that any problems associated with these arguments are minor and usually unustified. Parallel importers usually offer similar if not better warranties. Products designed for certain markets can be labeled as such, or often foreign language labeling on its own will indicate to consumers that a product formulation may be different. Also, parallel importers usually have their own promotional expenses.

If there are problems, there must be a better way we can work together to determine how best to inform the consumer that certain imports may differ either in formulation or warranty.

Mr. Chairman, our major trading partners do not restrict parallel imports. If the US trademark holders have a problem, it appears to me that they should try to solve it with their foreign parent trademark holders. These are not counterfeit goods; they are genuine. There should be no restrictions on their importation. I therefore urge you to oppose consideration of this legislation.

STATEMENT BY

CONGRESSMAN ROD CHANDLER

before the

SENATE JUDICIARY
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

HEARING ON REVISING THE LANHAM TRADEMARK ACT

APRIL 4, 1990

Mr. Chairman:

I appreciate this opportunity to express my strong opposition to S.626, the Trademark Protection Act of 1989. This legislation is detrimental to the interests of American consumers and our nation's economy.

S.626 would bar all parallel importation into the U.S. This would overturn over fifty years of Customs Service policy and regulations as well as the Supreme Court's 1988 decision in _K-Mart v. Cartier_ which upheld the key parts of those regulations. What will be the net effect of this legislation? Prices will rise, availability of products will decrease, and a number of foreign manufacturers will see their annual profits increase.

In order to prevent this outcome and to protect the legality of parallel imports against a variety of challenges, I have introduced H.R.771, the Price Competitive Products Act of 1989, which would put the Customs Service regulations into statutory form. I support affordability, reliability and availability for consumer products. S.626 will produce just the opposite result.

Parallel imports (called "gray market goods" by those who oppose them) are genuine, trademarked, foreign-produced goods which reach this country outside "authorized" distribution channels. Parallel importation occurs when foreign manufacturers discriminatorily set higher prices for their products in the United States than in the rest of the world, seeking to create an island of high prices in a sea of lower world prices.

Independent importers can offer discounts of 25 to 40 percent from the artificially high "authorized" distributors' prices of these foreign goods by buying goods abroad, even though they pay for shipment to the U.S. and Customs duties. These goods are the same goods as those that reach the U.S. through "authorized" distribution channels, but they are available at discounted prices because they have been purchased overseas at the lower, world price.

The most important issue concerning parallel imports is the impact on the American consumer. Parallel imports provide the only real price competition for many foreign-manufactured goods. In order to maintain their artificially inflated U.S. resale prices, many foreign manufacturers restrict distribution to high-priced retailers and boutiques. These retailers are more willing to follow the manufacturers' suggested retail sales price.

When independent distributors introduce parallel imports into the market, however, consumers are not held captive by the manufacturers' anti-competitive price-fixing behavior. Many of the products involved in parallel distribution are popular consumer products such as watches, cameras, liquor, crystal, fragrances and cosmetics.

Parallel imports acts as a brake on the manufacturers' schemes to charge higher prices in the U.S. than elsewhere in the world. In some instances, foreign manufacturers have reacted to parallel imports by bringing their U.S. and world prices in line, thereby eliminating the economic incentives for unauthorized distribution. This is the best evidence that parallel imports work to protect consumers from anti-competitive behavior and that it is the foreign manufacturers' own practices which foster parallel importation.

In addition to providing price competition, parallel imports benefit consumers by increasing availability of these desirable consumer goods. Foreign manufacturers often refuse to deal with discount retailers. The manufacturers' U.S. subsidiary distributors restrict their sales to the "exclusive" outlets and specialty stores which maintain the artificially high prices the manufacturers have set for the U.S.

Parallel importation and distribution makes these items more widely available than the exclusive department stores. In urban areas, restricted distribution is a large inconvenience. In rural areas or smaller cities, where the high-priced stores are not located, restricted distribution is equal to non-availability. I cannot support any legislation which will deny my constituents access to consumer products in order to increase profits for foreign manufacturers and their wholly-owned or affiliated U.S.. distributors.

The demand for these otherwise unavailable consumer goods has driven the growth in the discount retail and catalog/showroom industry, which sells genuine name-brand items at discount prices throughout the country. The discount industry employs thousands of workers and has annual sales totalling billions of dollars.

Yet foreign manufacturers are asking Congress to eliminate this segment of the economy which provides important consumer services. The foreign manufacturers demand the right to control the distribution of products they produce, even after they have sold the products on the open market, presumably at a profit. This flies in the face of long-standing trademark and copyright law which holds that bona fide purchasers of goods are not inhibited from reselling those goods. The foreign manufacturers have received just compensation, at prices they have set, in foreign markets. The fact that the manufacturers are denied the opportunity to reap extraordinary additional profits by controlling all sales in the U.S. is not a reason for Congress to eliminate parallel imports.

Such manufacturers are not entitled to charge American consumers a premium, simply because they perceive Americans to be more affluent and willing to pay higher prices, nor should the U.S. Government enforce their price discrimination against U.S. consumers. The right to establish discriminatory prices is accompanied by the likelihood of unauthorized and discounted distribution. Competition is healthy and serves as the foundation for our economic policies. This government has no need to sanction and enforce the anti-competitive practices of foreign companies. The government does have an obligation to protect U.S. consumers.

Proponents of S.626 have argued that this legislation is necessary to protect consumers and manufacturers. They claim that parallel imports create consumer confusion and harm consumer interests. Both claims are patently untrue.

Parallel imports are genuine, trademarked goods. They are not copies or counterfeits. They are produced in the same factories as the goods that are sold in authorized distribution channels and carry the same trademark applied by the manufacturer. Whether it comes from a discount store or an upscale boutique, the merchandise is the same. Discount retailers who offer parallel imports for sale include English instructions with the items if they are not included in the original packaging.

Contrary to the claims advanced by some foreign manufacturers, consumers who purchase parallel imports are not denied warranty protection. It is the foreign manufacturers themselves who deny consumers warranty protection if the goods are imported outside authorized distribution channels. The manufacturers could demonstrate their concern for American consumers more effectively if they honored their own warranties, especially when one considers that they have sold these goods abroad at a profit. Because the foreign manufacturers prefer to deny warranty protection to American consumers who buy parallel imports, discount retailers provide their own warranties. In many cases, these independent warranties exceed the manufacturers' warranties and provide consumers of parallel imports with greater protection than those who purchase goods from authorized dealers.

These claims of proponents of S.626 are clever disguises intended to conceal the true anti-competitive motives of the foreign manufacturers. If foreign manufacturers are so interested in free trade and fair commerce, they should follow the example of their own governments on this issue. Germany, France and Japan, the major sources of goods for parallel importation, all allow for parallel importation of U.S.-made goods across their borders.

In conclusion, I support the Supreme Court's K-Mart decision and support the efforts of consumers and discount retailers to promote free trade and competition. I believe that S.626 would harm the interests of the American public by increasing prices and curtailing the availability of popular products, and would do so for the special interest of a select group of foreign manufacturers.

Senator DECONCINI. Congressman, thank you. You make some very good arguments and, of course, I happen to agree with them.

I am interested in the other side of this issue as well, if you don't mind me just asking you this one question. The question of standards and quality—maybe there's someone else who can answer this—what is the answer to the question, why doesn't Johnson & Johnson require it to be made in Brazil exactly like it's made here?

Mr. CARDIN. There are several reasons for that. First, there are different requirements in Brazil for the manufacturing of cosmetics than in this country. We have different environmental rules, they have different manufacturing rules for many of their food and other such products, there are different standards in one country versus another.

In addition, it's a different market. The Brazilians may not like thick shampoo. Market studies may show they like a shampoo that's a more fluid product, so you need to develop a product for the local marketplace, whether it's Brazil or the United States.

Senator DECONCINI. I guess it goes without saying that they could not patent and then trademark a different so-called recipe or formula?

Mr. CARDIN. That's correct, you couldn't do that.

Senator DECONCINI. Thank you.

Do you have any questions, Senator Hatch?

Senator HATCH. No, you were very professional with your testimony.

Senator DECONCINI. Thank you very much, Congressman. We appreciate your coming over.

Mr. CARDIN. Thank you very much.

Senator DECONCINI. If our fist panel would come up, please: Prof. Christopher Edley, Jr., president, Coalition to Preserve the Integrity of American Trademarks; Mr. John Boardman, director of public affairs, Food & Allied Service Trade, AFL–CIO; Ms. Carol Tucker Foreman, consumer advocate; and Mr. Christopher C. DeMuth, economic consultant. Good afternoon, everyone.

We will start with you Mr. Edley, if you'd like to summarize your testimony. Because of the panels and witnesses we are having, we are going to ask if you can summarize your testimony in 5 minutes. We'll run a little clock here, if somebody has got that going for us here. So, we will ask you to do that. We will put your full statements in the record and any further statements you might want to have for the record that might come up during the hearing that are not included.

Mr. Edley.

STATEMENT OF CHRISTOPHER EDLEY, JR., PRESIDENT, COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS

Mr. EDLEY. Thank you, Mr. Chairman, and I apologize for the length of the formal statement and damage to the trees of the planet. My name is Christopher Edley, Jr. and I'm a professor at Harvard Law School, but I'm here in my capacity today as president of the Coalition to Preserve the Integrity of American Trademarks, known as COPIAT.

Our association and its members represent over 12,000 U.S. businesses and more than 2 million American workers. COPIAT includes a wide variety of American manufacturers, distributors, retailers, including IBM, Procter & Gamble, Duracell, General Motors, and the National Association of Manufacturers.

Today, Mr. Chairman, America's competitiveness is threatened around the world, including here at home. If we are to compete successfully, our intellectual property laws must provide the fundamental economic security companies need to invest and compete on the basis of consistent consumer expectations. These, Mr. Chairman, are the very purposes of the Lanham Act, and that is why your bill, Mr. Hatch, is supported by COPIAT and by the U.S. Trademark Association.

Now, let me be clear, gray-market goods are not counterfeit, although they do facilitate counterfeiting. They are often the best products available for the country where they were intended to be sold. However, they are produced to comply with foreign conditions, foreign legal requirements, and foreign tastes, and they are not imported through normal channels, so they almost always differ from the authorized product intended for this market.

On the table here are gray-market batteries and soaps, Pepsi, baby products, computer boards, and hosts of others, all of which differ from the U.S. product. Senator Rudman was mentioning Mercedes. I wish that we could have brought in the outboard motors and the tractors, but the guard objected.

Many of the products that you see here were sold in bins with authorized products, all of them at the same price, but none of the gray-market goods delivered the consumers what the consumers thought they were buying. Our members in COPIAT have spent millions of dollars over the years combating these practices at home and abroad. They have hired detectives, they've brought lawsuits, they've laser-coded their products, all to naught, because fundamentally the gray market has to be stopped at our ports.

Moreover, as the evidence in our written submission suggests, by opening our borders to the gray market we also have opened them to counterfeits.

Now, Mr. Chairman, gray-market entrants make three basic arguments, none of which stand up under even casual scrutiny.

First, gray marketeers would have you believe that this is just about Japanese watches and French perfume. They are very wrong. The table of goods, our membership lists, the presence here today of the AFL-CIO supporting this legislation, all are testimony to the fact that this is a broad and pervasive problem in our economy.

Second, the gray marketeers claim that this is an issue of price. Again, this is demonstrably wrong. COPIAT members regularly sell to a wide variety of retailers that discount. Indeed, gray-market goods are often sold to consumers at or above the price of the authorized products. These bottles of baby shampoo were bought at a discount store here in Washington. The gray-market version has different ingredients. It has an inaccurate ingredient label. It has no safety seal. The bottle is smaller so it actually sells for a little less, but in fact, it is 50 percent more expensive per ounce. Different product, bad price, it's not a deal for the American consumer.

Third, the other side claims that international price discrimination against the United States is common. They are wrong again. There simply is no empirical evidence to support such a claim. Indeed, basic data and basic economic principles point in the opposite direction. Fundamentally, these myths about the gray market are a smoke screen to obscure the simple truth. Gray-market profits depend upon the deception of the consumers and free riding on the investments of U.S. trademark owners. The proof of that is the gray marketeers' shrill opposition to demarking, a remedy we have long supported. Demarking would allow gray-marketeers to import products and sell them at any price, anywhere they wanted so long as they first remove or cover the trademark. As the examples on the table demonstrate, demarking would cost only pennies per item and can be easily accomplished. Demarking, Senators, would stop the deception and would stop the theft of intellectual property. Gray marketeers oppose demarking.

Your bill, Mr. Chairman, provides a simple and effective solution to this multibillion dollar problem. While we are fighting as a nation to strengthen our economy and become more competitive, your bill provides an opportunity we can ill afford to miss. Thank you.

[Executive summary and prepared statement of Mr. Edley follow:]

EXECUTIVE SUMMARY OF STATEMENT OF
CHRISTOPHER EDLEY, JR.

President
Coalition to Preserve the Integrity of
American Trademarks

Hearings on S. 626
Before the Subcommittee on
Patents, Copyrights and Trademarks
Committee on the Judiciary
United States Senate

I. INTRODUCTION

All gray market goods have three common characteristics:

First, gray market goods are imports. Thus, unlike many of the United States-manufactured products that they displace, gray market goods always are of foreign manufacture.

Second, gray market goods are produced of foreign components or ingredients, pursuant to foreign standards, for sale to consumers in foreign markets. They therefore often differ in material respects from their authorized United States counterparts, which are produced, whether here or abroad, to be sold to United States consumers in accordance with applicable American standards and American consumer tastes.

Third, gray market goods are imported outside of authorized distribution channels without the consent of the United States trademark owner, often through clandestine global networks. Accordingly, they encroach upon, and diminish the value of, the property rights of United States trademark owners and also facilitate the importation and sale of counterfeit goods.

Given its essential characteristics, the gray market is bad for American business, it is bad for American labor and it is bad for American consumers. And, as you shall hear today, its alleged redeeming qualities evaporate under scrutiny. Put simply, the gray market is a function of deceit and misappropriation -- the precise evils that the United States trademark system is intended to combat.

S. 626 would amend the Lanham Trademark Act to make clear that gray market goods are not to be imported into or sold in the United States, absent the consent of the United States trademark owner and without regard to what corporate affiliation the trademark owner may have overseas. In doing so, the bill would resolve the controversy surrounding the Customs Service gray market regulations existing since the early 1980's, 19 C.F.R. § 133.21(c), and mandate adoption of a national policy in an area where a narrowly divided Supreme Court in the K mart case has held that the present law explicitly prohibiting gray market goods is ambiguous.

Such a cohesive national policy is badly needed and long overdue. It is time to bring our federal policy on the gray market into accord with the purposes of our trademark system -- to protect consumers from confusion and deception and to protect trademark owners from a misappropriation of their property rights.

The dual functions of a trademark underlie the principle of "territoriality" of trademarks, a principle of trademark protection enunciated more than 60 years ago by Justice Holmes.

As explained by Judge Leval in Osawa & Co. v. B&H Photo, 589 F. Supp. 1163, 1173 (S.D.N.Y. 1984), the basis of this territoriality principle is "that a mark may have not only a separate legal basis but also a different factual significance in each separate country where the local mark owner has developed an independent goodwill." Thus, rather than simply specifying the origin or manufacturer of a good, the lawful function of a trademark is "to symbolize the domestic goodwill of the domestic mark holder so that . . . the reputation (the value of the mark) will not be injured through use of the mark by others in domestic commerce." Id. at 1172. This principle and the basic functions of a United States trademark are frustrated by the gray market.

II. Consumer Confusion and Deception

A. Product Differences

Consumers purchasing a gray market product usually do not realize that the product is being sold outside the

United States trademark owner's authorized distribution channels. In fact, in a random survey of consumers, 77 percent of those surveyed did not even know there was a gray market. Similarly, the International Trade Commission concluded from the results of a consumer survey prepared by Response Analysis Corporation on behalf of Duracell, Inc., that American consumers are likely to be confused into believing that foreign DURACELL batteries sold through gray market outlets in the United States are sponsored for sale by Duracell in the United States.

For example, gray market goods may not conform to United States specifications. In addition, gray market goods may not have been packaged for international transshipment, and are not subject to the inspection, transit and quality controls of United States trademark owners and their distributors. Gray market products that are ingested or applied, such as food, cosmetics, fragrances and pharmaceuticals, usually are prepared differently for foreign markets. Most of these products differ in terms of taste, smell or feel from the products made to be sold here. In addition, gray market cars, tractors, toys and cosmetics often do not meet U.S. safety standards. With these goods as with foods and cosmetics, the gray market thwarts effective recalls when this proves necessary.

B. Gray Market/Counterfeit Linkages

In addition, the sophistication and secrecy of the gray market has given rise to another serious consumer problem, namely, a link between the gray market and counterfeiting. Indeed, many counterfeits are made to look like gray market rather than authorized products. Often, the counterfeits and gray market goods are mixed together. In this way, counterfeiters are able to get their goods through Customs as gray market, and distributors and retailers can sell counterfeits with the excuse that they thought they were gray market, not counterfeit.

This is why a police affidavit states,

> "In our experience, this type of situation [gray market and counterfeit intermingling] is not uncommon. Because the gray market today is a lower risk activity, it is an ideal front for product counterfeiting operations. Foreign-made counterfeits that look like gray market goods are relatively easy to get into the country because Customs automatically lets most gray market goods in. Moreover, whether foreign or domestic, counterfeits that look like and are mixed with gray market goods give distributors and retailers the excuse that they didn't know the products were counterfeit but simply believed that they came in through the unauthorized gray market. In our view there is just no question about it: The gray market is a tremendous boon to product counterfeiters, and it makes detection and apprehension of them and others in the distribution chain in many cases next to impossible."

III. The Gray Market Provides No Benefits.

A. Not a Price Issue

The price issue is a red herring. The gray market is simply and demonstrably not a function of price, either in terms of resale control or discrimination. To the extent that gray marketeers charge lower prices -- and they typically do not -- they do so only by misappropriating the procompetitive investment that make possible the manifest benefits associated with trademarks.

B. Demarking

Indeed, COPIAT has long supported a concept that would allow gray marketeers to import products and to sell them in any manner and at whatever price they choose so long as they do so without free-riding on trademark goodwill and deceiving consumers. The concept, termed "demarking," would permit gray marketeers to import and sell products so long as they first demark the product, i.e, remove or cover the trademark.

This would require gray marketeers to make their sales on the basis of their own promotional and marketing investments and post-sale services, and not those of United States trademark owners. Demarking simply would require the removal or covering of trademarks on the products themselves. Demarking also has the benefit of being feasible and simple to administer. Most products can be demarked for pennies per item.

C. Resale Price Control

Gray marketeers attempt to convey the impression that discounted goods are synonymous with gray market goods. Nothing could be further from the truth. First, manufacturers and their authorized distributors typically sell to a wide variety of retailers, e.g., discount houses, catalogue merchandisers, department stores and small mom-and-pop stores.

Second, it is a fact that gray market goods often do not sell for less than legitimate United States trademarked products.

IV. The United States Needs a Cohesive Federal Policy

It is not an exaggeration to say that present Customs Service regulations effectuate no discernible policy. Indeed, whether a United States trademark owner is protected under the regulations does not depend upon how much the consumer is deceived by the gray market good, how many United States jobs are lost because of the gray market, or the long run harm to United States competitiveness. Rather the distinction is based wholly upon how a company happens to be structured. If a company is structured the wrong way, *e.g.* its foreign and United States trademarks are owned by corporate affiliates or by the same entity, then under 19 C.F.R. § 133.21 the company is simply out of luck. If on the other hand, a company manages the use of its trademark abroad or in the United States not by intercorporate ownership but by contract, it can obtain Customs protection.

It is time to resolve those ambiguities and, once and for all, to bring United States policy on the gray market fully into accord with our policy on other forms of intellectual property theft.

STATEMENT OF CHRISTOPHER EDLEY, JR.

President
Coalition to Preserve the Integrity of
American Trademarks

Hearings on S. 626
Before the Subcommittee on
Patents, Copyrights and Trademarks
Committee on the Judiciary
United States Senate

My name is Christopher Edley, Jr. and I am a professor at the Harvard Law School. I am testifying today in my capacity as President of the Coalition to Preserve the Integrity of American Trademarks ("COPIAT"). COPIAT is a non-profit association of more than 80 United States companies and trade associations, together representing over 12,000 individual American businesses. As the name suggests, COPIAT was founded to preserve the value of an integral part of our intellectual property system, and of our system of property rights generally, by opposing a very real and dangerous threat: the importation into and sale in this country of gray market goods.

It bears emphasis at the outset that COPIAT's sole focus is on United States trademark rights and the serious harm caused to American business, labor, and consumers by the gray market. It thus is not surprising that all of COPIAT's members are United States companies or associations. What may appear unique to those unfamiliar with the gray market, however, is the diversity in size and composition of our membership -- a diversity spawned by the breadth of the gray market problem in the United States.

COPIAT members include manufacturers, distributors and retailers from a variety of industries such as automobiles, shoes, fragrances and cosmetics, distilled spirits, electronics, household goods, personal-care products, photographic equipment, computers, beverages, batteries and watches, all of whom are hurt by the gray market. These member companies range from well-known major manufacturers to mom-and-pop retail outlets. General Motors, Ford Motor Company, IBM, Procter & Gamble, Duracell, American Cyanamid, Dial Corporation, Pepsico, and Reebok International are but a few of them. We are proud to claim among COPIAT's association members the National Association of Manufacturers.

Other organizations supporting COPIAT's efforts against the gray market are the AFL-CIO, the National Consumers League and the National Council of Senior Citizens. Joining together, we are here to urge the Subcommittee's full support for the Trademark Protection Act of 1989, S. 626, which would clarify present ambiguities in the law and unequivocally prohibit the importation into and sale in the United States of gray market goods.

While adversely affecting a vast array of United States industries, American employees and consumers, all gray market goods have three common characteristics:

First, gray market goods are imports. Thus, unlike many of the United States-manufactured products that they displace, gray market goods always are of foreign manufacture.

Second, gray market goods are produced of foreign components or ingredients, pursuant to foreign standards, for sale to consumers in foreign markets. They therefore often differ in material respects from their authorized United States counterparts, which are produced, whether here or abroad, to be sold to United States consumers in accordance with applicable American standards and American consumer tastes.

Third, gray market goods are imported outside of authorized distribution channels without the consent of the United States trademark owner, often through clandestine global networks. Accordingly, they encroach upon, and diminish the value of, the property rights of United States trademark owners and also facilitate the importation and sale of counterfeit goods.

Given its essential characteristics, the gray market is bad for American business, it is bad for American labor and it is bad for American consumers. And, as you shall hear today, its alleged redeeming qualities evaporate under scrutiny. Put simply, the gray market is a function of deceit and misappropriation -- the precise evils that the United States trademark system is intended to combat.

I. Federal Policy Should Effectuate Trademark Principles.

S. 626 would amend the Lanham Trademark Act to make clear that gray market goods are not to be imported into or sold in the United States, absent the consent of the United States trademark owner and without regard to what corporate affiliation the trademark owner may have overseas. In doing so, the bill would resolve the controversy surrounding the Customs Service gray market regulations existing since the early 1980's, 19 C.F.R. § 133.21(c), and mandate adoption of a national policy in an area where a narrowly divided Supreme Court has held that the present law explicitly prohibiting gray market good, is ambiguous. See K mart Corp. v. Cartier, Inc., 108 S. Ct. 1811, 1813 (1988).[1]

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[1] It is worth emphasizing that the Supreme Court in the K-Mart case expressly did not take a position on the policy implications (pro or con) of the gray market. The Court did take the unusual step of striking down one of Customs' regulations (19. C.F.R. § 133.21(c)(3)) that facilitate the gray marketing of some companies' goods. However, the gravamen of the Court's opinion is to follow its holding in Chevron USA, Inc., v. National Resources Defense Council,

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Such a cohesive national policy is badly needed and long overdue. It is time to bring our federal policy on gray market into accord with the purposes of our trademark system.

In this regard, it is well recognized that our trademark laws are intended to serve two distinct, yet related, purposes:

> "One is to protect the public so that it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of the trade-mark has spent energy, time and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats."

S. Rep. No. 1333, 79th Cong., 2d Sess. 3 (1946).

Proper effectuation of these dual goals, through the reach of trademark statutes, is important to a free society and free-market economy. Indeed, by preventing consumer confusion and deception and preserving a trademark owner's goodwill and his ability to obtain economic returns on his product and marketing investments, trademarks provide incentives for product development, marketing investments and the maintenance of product integrity. See generally, J. McCarthy, Trademarks

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Inc., 467 U.S. 837 (1984), and give an agency of the federal government broad discretion where any ambiguity has been found in the underlying statute. 108 S.Ct. 1811, 1813 (1988).

and Unfair Competition § 2.1 (2d ed. 1984); A. Miller and M. Davis, Intellectual Property, Part II (1983). This, in turn, results in better informed consumer choice and increased interbrand competition among products. As the Lanham Trademark Act legislative history also states:

> "Trade-marks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. Trade-marks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect trade-marks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not."

S. Rep. No. 1333, supra.

The dual functions of a trademark -- avoiding consumer confusion and preserving trademark owner goodwill -- underlie the principle of "territoriality" of trademarks, a principle of trademark protection enunciated more than 60 years ago by Justice Holmes. In the seminal case of A. Bourjois & Co. v. Katzel, involving an attempt by a U.S. trademark owner to prevent the importation of gray market face powder.

> "[This] deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care. . . . It is the trademark of the plaintiff only in

> the United States and indicates in law, and, it is found, by public understanding, that the goods come from the plaintiff although not made by it. . . . It stakes the reputation of the plaintiff upon the character of the goods."

260 U.S. 689, 692 (1923) (citations omitted).

As explained by Judge Leval in Osawa & Co. v. B&H Photo, 589 F. Supp. 1163, 1173 (S.D.N.Y. 1984), the basis of this territoriality principle is "that a mark may have not only a separate legal basis but also a different factual significance in each separate country where the local mark owner has developed an independent goodwill." Thus, rather than simply specifying the origin or manufacturer of a good, the lawful function of a trademark is "to symbolize the domestic goodwill of the domestic mark holder so that . . . the reputation (the value of the mark) will not be injured through use of the mark by others in domestic commerce." Id. at 1172.[2/] This principle and the basic functions of a United States trademark are frustrated by the gray market.

[2/] This is one reason why the copyright principle of international exhaustion of rights often referred to in the U.S. as the "first sale doctrine" has not become a part of our trademark laws.

The first sale doctrine in the copyright context provides that once an author has sold a work, he has no right to control the resale of the work. However, even under our copyright laws, the first sale doctrine has been found by the

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II. The Gray Market Undermines Trademark Goals.

Like counterfeiting, the gray market has been with us as long as there have been valuable property rights in a trademark. And, like counterfeiting, the gray market has reached truly epidemic proportions in our national market place of strong, well-recognized brand names.

Gray market goods include virtually all types of products. Auto parts, soaps, detergents, watches, cameras, shoes, electronic equipment, toothbrushes, toothpaste, batteries, computers, baby powder, tires, beverages, film, outboard motors, skis, cosmetics and porcelain are traded on the gray market, to name but a few.

While the prices, types and functions of these products vary widely, all share one common characteristic: A valuable and well-known trademark. By free-riding on these trademarks and tapping markets created by the trademark owner,

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courts not to apply to gray market cases -- where the work is made abroad and where the first sale takes place abroad. See CBS v. Scorpio Music Distributors, 569 F. Supp. 47 (E.D. Pa. 1983) aff'd without published opinions, 738 F.2d 424 (3d Cir. 1984). The only case holding to the contrary has been reversed on other grounds. Red Baron-Franklin Park, Inc. v. Taito Corp., 9 U.S.P.Q. 2d (E.D. Va. 1988), rev'd 883 F.2d 275, (4th Cir. 1989), cert denied, 110 S.Ct. 869 (1990). Moreover, even under the copyright laws the first sale doctrine does not deprive a copyright owner of his right to receive remuneration each time a work is performed. Id.

the gray market deceives American consumers and misappropriates trademark owner goodwill.

A. Consumer Confusion and Deception

That the gray market not only causes, but indeed depends upon, the confusion and deception of American consumers is a well established matter of fact. Empirical studies, federal agency investigations, court decisions and published accounts all corroborate what irate consumers and consumer advocates have been stating for years: Gray market goods are inherently confusing and deceptive. See Collado Associates, Inc., The Economic Impact of Diversion (September 1984); In re Certain Alkaline Batteries, 6 I.T.R.D. 1849 (Nov. 5, 1984); Lever Brothers Co. v. United States, 877 F.2d 111 (D.C. Cir. 1989). I would like briefly to explain why this is so.

1. Product Differences

By definition, gray market goods are diverted goods; they are not intended for shipment to or consumption in the United States. As such, they are almost always different from United States trademarked products in one or more important respects. However, because gray market goods bear trademarks identical to well known United States trademarks, consumers are not able to distinguish gray market goods from goods marketed directly by United States trademark owners and their authorized distributors.

Consumers purchasing a gray market product usually do not realize that the product is being sold outside the United States trademark owner's authorized distribution channels. In fact, in a random survey of consumers, 77 percent of those surveyed did not even know there was a gray market. Collado Associates, Inc., The Economic Impact of Diversion, supra at 53-53. Similarly, the International Trade Commission concluded from the results of a consumer survey prepared by Response Analysis Corporation on behalf of Duracell, Inc., that American consumers are likely to be confused into believing that foreign DURACELL batteries sold through gray market outlets in the United States are sponsored for sale by Duracell in the United States. In re Certain Alkaline Batteries, supra.

Thus, consumers do not realize, when purchasing a product bearing a trademark upon which they have come to rely, that they may be purchasing a gray market product that is physically different from the authorized trademarked product they intended to purchase. Such physical differences in gray market goods occur frequently because gray market goods are produced to foreign specifications and standards, use foreign local content, are old or discontinued models, or have been damaged by improper handling or storage in transshipping.

For example, gray market goods may not conform to United States specifications. Cameras may be calibrated in meters rather than in feet; electronic products may operate only with foreign voltage requirements and may not be serviceable in the United States; and photographic and electronic components may not correspond or be adaptable to United States product lines. See The Economic Impact of Diversion, supra, Appendix 2. A related problem exists with respect to precision products, such as watches, that must have certain internal markings in order to be imported legally into this country. See 19 C.F.R. § 11.9. Because gray market watches are not manufactured for importation into the United States, they lack the required markings. Gray market importers therefore must open and mark the watches themselves, often in uncontrolled and unsterilized environments, thereby greatly increasing the risk of defective performance. See The Economic Impact of Diversion, supra, Appendix 2.

In addition, gray market goods may not have been packaged for international transshipment, and are not subject to the inspection, transit and quality controls of United States trademark owners and their distributors. As a result batteries may have a shortened life, the flavor of beverages may deteriorate due to improper temperature controls during transit and detergent may be ruined by excessive moisture from packaging inadequate for overseas transshipment. Similarly, cameras, watches and electronic equipment may suffer internal damage not readily detectable by the consumer at the point of sale. See, id.

Gray market products that are ingested or applied, such as food, cosmetics, fragrances and pharmaceuticals, usually are prepared differently for foreign markets. Many such products do not comply with United States ingredient labeling requirements. Some, such as gray market soaps, lack the antiperspirant qualities of United States-manufactured authorized products because consumers in overseas markets want them that way. Others like gray market detergent may lack ingredients essential to proper performance under water conditions in the United States. Still others may contain ingredients prohibited by federal law because they may cause severe allergic reactions or may, in the FDA's judgment, cause other undesirable risks. For example, 50,000 units of Oil of Olay imported through the gray market were recalled from the shelves of retailers because they contained Red Dye No. 2, legal in the country of manufacture but banned in the United States. See FDA Reports, Toiletries, Fragrances and Skin Care 7 (Oct. 22, 1984). Finally, most of these products differ in terms of taste, smell or feel from the products made to be sold here.

In addition, gray market cars, tractors, toys and cosmetics often do not meet U.S. safety standards. With these goods as with foods and cosmetics, the gray market thwarts effective recalls when this proves necessary.

Gray market goods also are almost never entitled to factory-authorized warranty service in the United States. This can be expensive for consumers; for example, the minimum service charge on some professional cameras is $300.00. Gray market warranties are no substitute: Not only must the consumer typically pay for gray market warranty service (sometimes characterized as a "handling charge") when on occasion such service is available, but such gray market service as is available does not involve factory-trained technicians.

Moreover, gray market products for a variety of reasons are more likely to break down. For example, as noted above, gray market electronic equipment is frequently not packaged for international transshipment. Moreover, transshipment of gray market goods is often below acceptable standards, for example, involving water damage and extremes of heat. Indeed, the May 6-17, 1986 issue of New York City Business reported that one of the largest gray market camera distributors in New York was the leader -- by nearly 2-to-1 -- in complaints filed with the Department of Consumer Affairs.

Other common deficiencies of gray market products include foreign-language instruction manuals; inadequate warranties and service by gray market distributors and unavailability of replacement parts and inventory. See The Economic Impact of Diversion, supra, Appendix 2.

The foregoing kinds of gray market consumer problems are very real. They have caused New York City and states such as New York, New Jersey, Connecticut and California, among others, to consider legislation requiring that consumers be warned about the dangers of the gray market. They also have caused periodicals such as *Family Circle* and *Good Housekeeping* and well known consumer columnists such as Sylvia Porter to publish prominent warnings about the dangers of buying gray market products.

2. Gray Market/Counterfeit Linkages

In addition, the sophistication and secrecy of the gray market has given rise to another serious consumer problem, namely, a link between the gray market and counterfeiting. See Drug Diversion, a Staff Report by the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, 99th Cong., 1st Sess. (June 1985). Indeed, many counterfeits are made to look like gray market rather than authorized products. Often, the counterfeits and gray market goods are mixed together. In this way, counterfeiters are able to get their goods through Customs as gray market, and distributors and retailers can sell counterfeits with the excuse that they thought they were gray market, not counterfeit.

This is why a police affidavit states that the gray market "is an ideal front for product counterfeiting operations" and "a tremendous boon to product counterfeiters." See Affidavit of Richard D. Breuer and James T. Golden (June 9, 1987).

More specifically, as these officers have said in sworn statements,

> "In our experience, this type of situation [gray market and counterfeit intermingling] is not uncommon. Because the gray market today is a lower risk activity, it is an ideal front for product counterfeiting operations. Foreign-made counterfeits that look like gray market goods are relatively easy to get into the country because Customs automatically lets most gray market goods in. Moreover, whether foreign or domestic, counterfeits that look like and are mixed with gray market goods give distributors and retailers the excuse that they didn't know the products were counterfeit but simply believed that they came in through the unauthorized gray market. In our view there is just no question about it: The gray market is a tremendous boon to product counterfeiters, and it makes detection and apprehension of them and others in the distribution chain in many cases next to impossible."

So long as products are allowed to be sold outside of authorized distribution channels without the consent of the U.S. trademark owner, the importation and sale of counterfeit and other illicit merchandise will flourish.[3] This is compelling testimony to the effectiveness and stealth of the gray market network -- an international phenomenon that is virtually impossible to control beyond the borders of the United States.

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[3] Indeed, in a study completed last year for COPIAT by a former FBI agent and now a private investigator active in a large number of counterfeit busts, T.M. Huhn, the same counterfeiting and gray market linkage was confirmed. As Mr. Huhn has said:

> "And, I can report as a result of my efforts, I am convinced that there is clearly a very significant linkage between gray marketeering and counterfeiting.
>
> "This linkage appears to have developed for several reasons.
>
> "First, the gray market is a very useful disguise behind which counterfeit goods can hide. As noted below, frequently counterfeiters will bring in their goods along with a few gray market goods, and indeed will make their counterfeits to look like gray market goods. Mixed together in this fashion it becomes exceedingly difficult for law enforcement agents to spot counterfeit goods.
>
> "Second, the gray market provides a very useful defense for importers and retailers caught with counterfeit goods. When caught red-handed with counterfeits, the guilty party can claim, 'I didn't know these were counterfeits; I thought that they were gray market.'
>
> "Third, the gray market phenomenon itself, with its willy nilly pattern of importation, where there are no longer one, two or ten authorized importers but rather dozens of importers of a good, and in many cases importers that frequently change their company names, addresses, etc., has made it very difficult for law enforcement agents to distinguish between what is a counterfeit and what is a gray market good. And, given the very limited resources with which our law enforcement agents are able to fight commercial fraud, the Trojan Horse of the gray market in practice dramatically limits effective counterfeit enforcement." Study prepared for COPIAT by T.M. Huhn Associates, Inc., June 19, 1989.

As a report by the House Subcommittee on Oversight & Investigations of the Committee on Energy & Commerce emphasizes:

> "The primary reason that counterfeits like Ovulen 21 could easily be introduced into the distribution system is the existence of what is referred to as the diversion market." House Subcommittee Report, p. 2.
>
> "The result [of the diversion market] is that legitimate manufacturers, wholesalers and retailers are at the mercy of a system that neither they nor anyone else really controls. Adding insult to injury, G.D. Searle and Company was forced to withdraw from the market significant quantities of birth control pills that it had produced and knew to meet all federal quality requirements. The monetary damage can be calculated, but the loss of consumer good will -- and future sales of Searle products -- cannot be known. Ultimately, the problem comes down to a question of consumer health and confidence." House Subcommittee Report, p. 3.

B. Free Riding and Misappropriation of Goodwill.

I stated earlier that the gray market not only causes, but indeed depends upon, the confusion and deception of American consumers. This is the case because without such consumer confusion, gray marketeers would not be able to tap the markets created by United States trademark owners.[4/] It is only by free-riding on the investments of trademark owners and authorized distributors, and misappropriating the goodwill in the trademarks created by those investments, that the gray market is profitable, and hence possible.

In order to create the goodwill in their trademarks, to establish brand reputations and to develop consumer markets, United States companies such as the members of COPIAT make significant, essential investments in this country. These investments in goodwill are numerous and include: Extensive brand advertising; launch campaigns; in-store promotional activities, including sales force training, counter and window displays, gift-with-purchase programs and customer samples; external promotions such as trade show exhibits and sponsorship of sports or other events; research and development operations, including design of models and products tailored to the United States markets; packaging design;

4/ It is quite telling that gray marketeers only import brands well known in the United States. Gray marketeers could import equally desirable products that bear brands famous abroad but not in the United States, and these products could be sold at or below the price of the goods bearing the U.S. brand. Clearly, gray marketeers only deal in famous U.S. brands because this business is based on free-riding on the goodwill created in the U.S. trademark.

development of special testing and service equipment; United States market research; test marketing; United States manufacturing, assembling and packaging operations; sales forces; United States inventories, including replacement parts, subassemblies, assemblies, and accessories; warranty service departments and service centers; and customer relations, including customer training courses, product information centers, product literature and owner's clubs.

The consumer demand for products with trademarks such as Pepsi Cola, Camay, Colgate, Duracell, and Ford is the result of these investments and a measure of the goodwill created by the trademark owner through such investment and hard work. Indeed, many trademark owners spend millions of dollars developing the consumer markets for just one trademarked product. See Lever Bros. Co. v. United States, 877 F.2d 101 (D.C. Cir. 1989) (where considerable advertising expenditures to launch new product seriously undermined by gray market). Similarly, in the fragrance industry, promotional costs can account for up to 40 percent of the retail price of a product. In the alcoholic beverage industry, marketing investments require over 27 cents of every retail dollar.

A trademark owner's brand advertising and promotion is designed to create the market for a particular brand of product and must be substantial to be successful. In contrast, the kind of retail advertising and marketing that gray marketeers engage is quite different. Such retail advertising depends upon creation of the market by the trademark owner's brand advertising. It is used to attract consumers to particular stores selling the branded product in question but only after the market for the product has been established by the trademark owner's promotional activities. See John D. Burke, Advertising in the Market Place, 47 (McGraw-Hill 1980); Robert E. Oliver, Advertising at Work in the Modern Market Place, 13 (McGraw-Hill 1976).5/

A gray market importer thus relies on the United States trademark owner's substantial brand advertising and promotion to create the demand for a particular trademarked product. Through retail advertising it then uses the market created by the trademark owner without incurring any brand-advertising costs. This type of free-riding is the reason why the gray market is able to exist, and it gives gray marketeers an enormous and unfair advantage. Indeed, so long as the cost of transshipping a gray market product to the

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5/ This is not to suggest that advertising by some distributors and retailers does not enhance the brand. Retailers and distributors (sometimes in conjunction with the trademark owner) often engage in brand advertising. However this is not the case in respect of such advertising as exits for gray market goods.

United States is less than the United States trademark owner's promotional and marketing costs, there is a profit to be made even where the production costs of the gray market and authorized product are identical. This problem is heightened by international currency swings, which can increase United States marketing expenditures relative to foreign costs of transportation.

The investments of COPIAT members and other United States trademark owners are precisely the kind of investment activity that the trademark laws, in creating a definable property right, are supposed to encourage. Gray market importers benefit from the reputation of these trademarked products without having incurred any of these investments. They thus deprive American trademark owners of some part of the expected return on their investments. To the extent that gray market goods displace sales of United States trademarked products, disrupt marketing mechanisms and substantially decrease economic returns, as they in fact do, they significantly diminish the value of United States trademark owners' goodwill and correspondingly diminish their incentives to continue to make these investments. The result is a bad one for United States trademark owners but equally unfortunate for the United States consumer, who presently, due to the incentives created by our intellectual property system, has an opportunity to make an informed choice among quality products at competitive prices.

III. The Gray Market Provides No Benefits.

A. Not a Price Issue

Thus, the costs we incur, as a free economy and world leader, for the gray market's existence are high, and they will continue to climb. Of equal importance, however, is the fact that for those costs we have purchased nothing, since the gray market carries with it no discernible benefits for the United States. Of course, as you are aware, the claim of the gray marketeers is that the gray market is a function of price, and that it benefits consumers by offering lower prices. While, as discussed above, the gray market is not a bargain for American consumers at any price, I would like to explore briefly the gray market price argument, as we believe it to be manifestly wrong.

I will begin by stating categorically that the price issue is a red herring. The gray market is simply and demonstrably not a function of price, either in terms of resale control or discrimination. The trademark laws that currently protect trademark owners and consumers from gray marketeers are intended to create investment, product and marketing incentives and thereby to promote interbrand competition for both the short- and long-run benefit of the public in terms of more and better products and lower prices. To the extent that gray marketeers charge lower prices -- and they typically do not -- they do so only by misappropriating the procompetitive investment that make possible the manifest benefits associated with trademarks. As noted by the court in Osawa Co. v. B&H Photo, 589 F. Supp. 1163, 1176, 1178 (S.D.N.Y. 1984), the trigger of statutory trademark protection is the mark itself, not price.

B. Demarking

Indeed, COPIAT has long supported a concept that would allow gray marketeers to import products and to sell them in any manner and at whatever price they choose so long as they do so without free-riding on trademark goodwill and deceiving consumers. The concept, termed "demarking," would permit gray marketeers to import and sell products so long as they first demark the product, *i.e*, remove or cover the trademark.

This would require gray marketeers to make their sales on the basis of their own promotional and marketing investments and post-sale services, and not those of United States trademark owners. Demarking simply would require the removal or covering of trademarks on the products themselves. Indeed, Sears Roebuck is testimony to the ability of enterprising retailers to sell otherwise brandname products on the basis of their own promotional and service efforts. Demarking also has the benefit of being feasible and simple to administer. Most products can be demarked for pennies per item.

To date, however, gray marketeers have refused to demark products and have opposed the concept of demarking outright. The reason for their ardent opposition would seem to have nothing to do with price -- rather demarking would mean that (1) sellers of gray market products would have to stop free-riding on others' investments and instead make their own and (2) gray marketeers would be unable to deceive consumers and instead would have to explain why the product does not bear a trademark. This would substantially curtail free-riding and permit the consumer to make an educated buying decision -- it is unpalatable to gray marketeers.

C. Resale Price Control

Gray marketeers attempt to convey the impression that discounted goods are synonymous with gray market goods. Nothing could be further from the truth.

First, manufacturers and their authorized distributors typically sell to a wide variety of retailers, *e.g.*, discount houses, catalogue merchandisers, department stores and small mom-and-pop stores. For example, catalog merchandisers such and Best Products and Service Merchandise, are authorized distributors of Seiko watches and Minolta cameras, and regularly discount these and other products; in the Washington area Ritz Camera, Penn Camera and Pro Photo are authorized distributors of many well-known photographic products -- they commonly advertise discounts. And K mart, one of the major discount chains, is an authorized distributor of the products of many COPIAT members.

Second, it is a fact that gray market goods often do not sell for less than legitimate United States trademarked products. For example, in the case of batteries, gray market goods often sell at the manufacturer's suggested retail price. _See_ _Certain Alkaline Batteries_, _supra_. This also is the case with gray market fragrances. In 1984, Charles of the Ritz Group conducted a random survey of 124 stores throughout the country selling their fragrances on the gray market and found 62 percent were selling at or above their suggested prices.

As then Congressman Fred Eckert testified before the House Subcommittee in Oversight and Investigations,

> "Mr. Chairman, our continuing series on hearings and the staff's diligent and thorough investigation has provided this subcommittee with overwhelming evidence of a thriving, multi-billion dollar market in drugs which are removed from normal channels of distribution through theft and fraud, routed through numerous companies, delivered to ports around the United States and the world, and finally sold to wholesalers and retailers at huge profits. These drugs are no longer able to be recalled and may be stored or handled improperly. Yet, those who purchase and sell them ask no questions. Only the ultimate, and unwitting consumer is forced, without his knowledge or consent, to take the risks. _Ironically, the consumer reaps no discernible benefit for_

> this risk -- the prices he pays are not significantly reduced, although each buyer and seller has "beat the market" by dealing in diverted drugs." Opening Statement of Honorable Fred J. Eckert, Subcommittee on Oversight and Investigations, July 15, 1986, Hearing on Prescription Drug Diversion (Emphasis added).

Moreover, many gray market goods, such as soap and baby shampoo, typically are sold side-by-side with authorized trademarks at identical prices. In such cases, the shopper picking improperly-labeled and differently composed gray market Brazilian baby products off the shelf could have brought home the United States-authorized-and-manufactured product from the same shelf at the same price. In other cases, gray marketeers advertise supposed "discounts" that actually turn out to be higher than the manufacturer's suggested retail price.

Thus, the issue of enforcement of intellectual property rights in the context of the gray market is far different from the issue that arose in the 1960's with respect to the "fair trade laws." Those laws were designed to permit a manufacturer to enforce the price at which its goods could be sold at retail. The enforcement of our intellectual property laws simply has nothing to do with the price at which the trademarked goods or infringing merchandise are sold at retail. Indeed, the plethora of authorized retailers that routinely discount their products suggests the absence of any scheme by United States trademark owners to engage in resale price maintenance. Moreover, United States trademark owners are not immune from the antitrust laws. It is a per se violation of the antitrust laws for any companies to set retail prices. To the extent that any companies violate these antitrust laws, they subject themselves to liability. See, Dr. Miles Medical Co. v. J.D. Park & Sons Co., 220 U.S. 373 (1911); Brief for the United States of America in Bell & Howell · Mamiya Company v. Masel Supply Company, 719 F.2d 42 (No. 82-7857) (2d Cir. 1983).

D. Price Discrimination

Similarly, the gray market issue is not one of international price discrimination against the United States. In this regard, I would commend to members of the Subcommittee a detailed economic analysis prepared by the highly regarded economic consulting firm of Lexecon, Inc. at COPIAT's request. See Lexecon Inc., "The Economics of Gray-Market Imports (May 1985). As this study indicates, the gray market fundamentally is a matter of free riding and not price discrimination.

First, there simply is no empirical evidence to support the notion of widespread price discrimination against the United States. To the contrary, existing data show that United States prices are lower, not higher than prices in foreign economies. See Irving B. Kravis and Robert E. Lipsey, Toward an Explanation of National Price Levels, Princeton

Studies in International Finance, No. 52 (November 1983) at 2, 12.

Second, our information indicates that many United States trademarked products are sold to authorized United States distributors at prices that are less than those charged by the manufacturer to distributors overseas. Moreover, it is elementary economics that price discrimination is feasible only to the extent that a manufacturer is free from competition in the market where it is charging the higher price. In the vast majority of markets subject to gray market importation, however, manufacturers face intense competition from other manufacturers of similar products who would profit from undercutting the manufacturer's higher United States price. "The Economics of Gray-Market Imports," supra. The relevant market is not Colgate toothpaste competing with imported Colgate toothpaste. Colgate is in direct competition with countless other brands, and retailers are in competition with each other.

It also bears mention that gray market importation is an international phenomenon, and not confined to the United States. The gray-market controversy exists in Japan, Great Britain, West Germany and other nations, as well as here. If the United States were being discriminated against, this would not be true: gray-market importation would be a one-way street leading to the United States. It is not.

In fact, in closely examining a gray market import case several years ago where the gray marketeer claimed that the gray market was merely a response to price discrimination, the Antitrust Division of the Justice Department concluded otherwise:

> Indeed, the legislative history of the Lanham Act reflects a legislative determination that protection of investments in goodwill and product quality as well as preventing consumer deception were statutory goals. . . . The same trademark policy considerations apply whether or not the U.S. trademark owner is controlled by a foreign producer of the trademarked product. A vertically integrated manufacturer, like an independent United States distributor of a foreign product, needs to protect its investment in advertising and promotional activities in the United States. . . . Federal trademark and antitrust policies are complementary, not antagonistic. There is no need to arbitrarily narrow trademark protection in order to advance antitrust policy. On the contrary, the use of trademarks, and their consequent protection under federal statute, generally enhances competition by improving consumer awareness.

Brief for the United States of America in Bell & Howell · Mamiya Company v. Masel Supply Company, 719 F.2d 42 (No. 82-7857) (2d Cir. 1983) at 11, 12, 16.

Fundamentally, the price discrimination myth is a smokescreen to hide the true reason for the gray market: The profitability of free-riding on the investments and hard work of U.S. trademark owners in building brands and creating the demand for their products. Amounting in some cases to more than 40 percent of the retail price, it is these legitimate investments in trademark goodwill that give the gray market its unfair advantage.

E. Availability

It should also be noted that the gray market is not, as gray marketeers insist, a function of the unavailability of authorized products to U.S. consumers, whether they be in heavily populated metropolitan area or rural towns. It is ludicrous to suggest that companies like Duracell, Procter & Gamble or Ford would restrict supply to particular areas of the country for any reason, particularly after they have invested so heavily to create markets throughout the country.

IV. The United States Needs a Cohesive Federal Policy

From the standpoint of COPIAT and its members, a United States trademark is of little value if its fundamental purposes cannot be fulfilled. Yet, that is precisely where we have been, and where we find ourselves today, with respect to the gray market.

Despite repeated fits and starts, neither this nor the prior Administration has been able to articulate, let alone adopt, a coherent enforcement policy with respect to this multi-billion dollar problem. Its present Customs Service regulations concerning the gray market, 19 C.F.R. § 133.21(c), follow 50 years of checkered enforcement that has been neither consistent nor coherent. As stated by the United States Court of Appeals of the Federal Circuit in Vivitar Corp. v. United States, 761 F.2d 1552 (Fed. Cir. 1986):

> "Customs has had and continues to have changing views of the role of Customs in enforcing Section 1526(a). . . . Rather than the consistent policy of administration over the years, it appears that Customs has had continuing questions concerning the reading of the statute."

Id. at 1565, 1568.

Moreover, it is not an exaggeration to say that present Customs Service regulations effectuate no discernible policy. Indeed, whether a United States trademark owner is protected under the regulations does not depend upon how much the consumer is deceived by the gray market good, how many United States jobs are lost because of the gray market, or the long run harm to United States competitiveness. Rather the distinction is based wholly upon how a company happens to be structured. If a company is structured the wrong way, e.g. its foreign and United States trademarks are owned by corporate affiliates or by the same entity, then under 19 C.F.R. § 133.21 the company is simply out of luck. If on the other hand, a company manages the use of its trademark abroad or in the United States not by intercorporate ownership but by contract, it can obtain Customs protection.

In this regard, the present Customs regulations were questioned on trade policy grounds by United States Trade

Representative William Brock. See Letter to Commissioner of Customs, October 5, 1982. The Antitrust Division of the Department of Justice, joined by the Chief Counsel of the Customs Service itself, also has questioned, on trademark and antitrust grounds, the distinctions drawn by the Customs regulations. Brief for the United States of America in Bell & Howell · Mamiya Company v. Masel Supply Company, 719 F.2d 42 (No. 82-7857) (2d Cir. 1983) at 11, 12, 16, 17.

The Reagan Administration recognized publicly the need to reexamine the Customs regulations, requesting comments on alternative enforcement policies. See 51 Fed. Reg. 22005-07 (1986). That was nearly five years ago. At the same time, it has defended these regulations in three court challenges, and now is being forced to grapple with that portion of the regulations struck down by the Supreme Court. See K mart v. Cartier, supra; 54 Fed. Reg. 51,035 (December 12, 1989).

With respect to the judiciary, although the regulations have been and continue to be the subject of much litigation, see, Lever Brothers Co. v. United States, 877 F.2d 111 (D.C. Cir. 1989); COPIAT v. United States, 790 F.2d 903 (D.C. Cir. 1986); Olympus Corp. v. United States, 792 F.2d 315 (2d Cir. 1986), aff'g, 627 F. Supp. 911 (E.D.N.Y. 1985); Vivitar Corp. v. United States, 761 F.2d 1552 (Fed. Cir. 1985), aff'g, 593 F. Supp. 420 (CIT 1984), the Supreme Court, albeit by a 5-4 margin, has sustained major portions of the regulations, not because they make any policy sense on trademark grounds, or otherwise, but rather because it found existing law to be ambiguous. See K-mart v. Cartier, supra.

It is time to resolve those ambiguities and, once and for all, to bring United States policy on the gray market fully into accord with our policy on other forms of intellectual property theft. If we are to avoid continuing damage to the fabric of our intellectual property system and to our ability to maintain a vital, competitive and free economy, the United States Government must articulate, once and for all, a cohesive national policy against the gray market. COPIAT strongly believes that amendment of the Lanham Act in the manner provided for by S.626 would effectively accomplish this goal.

Thank you.

Senator DeConcini. Thank you very much.
Mr. Boardman.

STATEMENT OF JOHN BOARDMAN, DIRECTOR OF PUBLIC AFFAIRS, FOOD & ALLIED SERVICE TRADE, AFL-CIO

Mr. Boardman. Thank you, Mr. Chairman. We appreciate the opportunity to appear before the subcommittee today.

My name is John Boardman. I am appearing today on behalf of the Food & Allied Service Trades Department, AFL-CIO and its constituent unions who represent more than 3½ million working men and women. I'm also here appearing for all of organized labor. We have strong concerns about the harmful effects of the gray market on the economy of the United States and on American labor in particular. With me today are a number of distinguished members of the labor community.

I would like to submit for the record a resolution recently passed by the AFL-CIO that condemns the importation of gray-market goods and favors immediate legislative curbs on their importation.

[The resolution follows:]

Gray Market Goods

WHEREAS, The decade of the 1980s has witnessed a three-fold escalation in the value of gray market goods which have increasingly become a thorn in the side of industries which are sensitive to import penetration. These goods manufactured abroad, bearing the trademark of a U.S. trademark owner, but imported without the owner's authorization, have become a crucial negative factor in the import situation facing America today; and

WHEREAS, Gray market goods hurt all American workers without redounding to the advantage of the American consumer. The sale of gray market imports almost invariably means the loss of a sale for the U.S. manufactured product of the same trademark, thus the adverse effect on American jobs. In other cases, the importation and sale of a gray market product robs the U.S. of a sale of a competitive product manufactured in the U.S. with a different trademark. In addition, gray market sales which "free-ride" on the trademark owner's efforts in advertising, research, development and service, reduce employment in the U.S. in those sectors that are most crucial to our economy as a whole: and

WHEREAS, The increasing flood of gray-market imported alcoholic beverages has contributed to the economic malaise in the alcoholic beverage industry. The 1980s have coupled systematic shutdown of our nation's distillery operations with a slowdown in the wine industry, both resulting cumulatively in erosion of union membership; and

WHEREAS, The gray marketeer in the alcoholic beverage industry has a competitive edge because he is "free-riding" on the expenses born by the U.S. trademark owner in building his trademark and, no less important, complying with national and state laws in developing and marketing his products. These products deceive consumers into nurturing illusions that they are buying authorized trademarked goods when in fact they are too often shoddy and inferior substitutes. Especially with respect to alcoholic beverages, gray market items may be different in terms of physical products from authorized products such as distilled spirits since they are intended to be sold abroad and are merely transshipped here for profit. In addition, the wines certainly do not have the restrictions with regard to chemical and other properties which pertain in U.S. products. For example such as with Bailey's Irish Cream, the gray market beverage is likely to contain less desirable ingredients—artificial vanilla instead of real vanilla. Most importantly, the gray market goods give rise to potential health hazards because the producer is unable to be sure what is actually being sold to the ultimate consumer and unable to recall an improperly produced item; therefore, be it

RESOLVED: That the AFL-CIO favors immediate institution of legislative curbs on all gray market goods.

Mr. **Boardman**. We greatly appreciate the active support for passage of S. 626 by subcommittee chairman, Dennis DeConcini, ranking member, Orrin Hatch, and Senator Howard Heflin of the subcommittee. Organized labor stands by you to work with you for passage of your bill this year.

Organized labor understands all too well the importance of protecting intellectual property rights of U.S. companies against misappropriation by the gray market. The benefits of such protection accrue directly to American workers, I should stress. In contrast to the picture painted by gray marketeers, the range and diversity of American industries adversely affected by the gray market are considerable, including U.S. manufacturers who sell in this country only that which they produce here. Soft drinks, household goods, alcoholic beverages, glass container products, auto parts, outboard marine engines, and batteries—these are but a few examples of American-manufactured products that are being displaced by the sale of gray-market goods.

U.S. industries hurt by the gray market also include nonmanufacturing concerns, such as authorized importers and distributors. These companies also utilize significant numbers of U.S. workers in marketing and servicing their products, whose jobs would be lost. American companies and their workers have been dedicating themselves to improving the quality of U.S. products. That has not been without sacrifice on the part of U.S. labor. Our products and our brands can compete, however, if they are allowed to do so on a fair playing field. American workers can compete on the basis of quality and service. American workers can give consumers what they desire, a quality product at a fair price.

The gray market does not invest in American labor, indeed it is precisely the avoidance of labor and other costs incurred by the U.S. trademark owners and their authorized distributors in creating valuable trademarks that allows the gray marketeers to turn a profit. Unlike authorized products that are displaced by the gray-market sales, gray-market goods are not manufactured, marketed, or serviced in this country in any meaningful way.

The U.S. trade deficit is one of the critical issues facing this country today, and the gray market contributes markedly to this problem. The preliminary estimate for the 1988 merchandise trade deficit is $113 billion. The gray market is estimated to account for $6 to $10 billion in imports a year.

The trade deficit does affect our jobs. A study by the Economic Policy Institute examining the deficit and its impact in 1987 estimated that job losses due to the deficit range anywhere from 4.8 to 5.5 million jobs. We believe it is an outrage that gray-market goods are allowed to contribute billions of dollars annually to our balance of trade problem while destroying the integrity of valuable trademarks and adversely affecting Americans who work.

This situation is further aggravated by the inner relationship between gray market and counterfeit goods. The U.S. Trade Commission estimates that this country loses 113,000 jobs annually due to counterfeits. Law enforcement officers have stated that the gray market "is an ideal front for product counterfeiting operations and a tremendous boom to product counterfeiters." We, therefore, believe that putting a stop to the gray market also would go a long way toward addressing this job loss caused by counterfeit imports.

While Congress debates the issue of who and what is to blame for America's faltering competitiveness, the gray market continues to flourish. As the gray-market network grows, so too does the counterfeit network. Each contributes to the erosion of the brand of products produced by Americans, leaving U.S. workers unemployed. Additionally, the gray market destroys the effort by American workers and their companies to enhance the desirability of brand name products by improvements in quality and service.

Prohibiting the gray-market goods is a small but important step toward allowing American workers to compete fairly and retain their jobs. We are hopeful that Congress can take a stand now to save American jobs from this very real and very damaging threat to the livelihood of American workers and to the U.S. economy. Thank you Mr. Chairman.

[The prepared statement of Mr. Boardman follows:]

90-13

TESTIMONY OF JOHN A. BOARDMAN
FOOD AND ALLIED SERVICE TRADES DEPARTMENT
AMERICAN FEDERATION OF LABOR CONGRESS OF INDUSTRIAL ORGANIZATIONS
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON AMENDING THE LANHAM TRADEMARK ACT REGARDING GRAY MARKET GOODS

APRIL 4, 1990

Mr. Chairman and members of the Subcommittee, my name is John Boardman and I am appearing before you today on behalf of the Food & Allied Service Trades Department, AFL-CIO, and its constituent unions which represent more than 3.5 million working men and women. I am also appearing to state all of organized labor's strong concerns about the harmful effects of the gray market on the economy of the United States and American labor in particular. We believe that the importation and sale of gray market goods has become a crucial negative factor in America's trade situation and directly harms American workers' ability to compete. As part of my testimony, I would like to submit for the record a resolution recently past by the AFL-CIO that condemns the importation of gray market goods and favors immediate legislative curbs on their importation.

Let me state at the onset that we greatly appreciate the active support for passage of S.626 by Subcommittee Chairman Dennis DeConcini, Ranking Minority Member Orrin Hatch, and Senator Howard Heflin of the Subcommittee. Organized labor is committed to working with all of you and the other cosponsors for passage of your bill this year.

Organized labor understands all to well the importance of protecting the intellectual property rights of United States companies against misappropriation by the gray market. The benefits of protection of those rights accrue directly to American workers who not only can produce the goods but can see their efforts to improve quality result in consumer identifications with their brand's name. However, when American industry - whether it be manufacturing, distribution, servicing or marketing segments--is hurt by its inability to obtain a fair return on its investments in a brand name, the victims on the front line are American working women and men.

I. The Gray Market Adversely Affects Millions of American Workers.

As members of the subcommittee are aware, the range and diversity of American industries adversely affected by the gray market are considerable. They include United States manufacturing industries that sell in this country only that which they produce here. A few examples of the particular industries and companies whose American-manufactured products are being displaced by sale of gray market goods are soft drinks by Pepsico, household goods, manufactured by Johnson & Johnson, Lever Bros., Proctor & Gamble and Dial, alcohol beverages, glass container products, auto parts manufactured by workers at Ford Motor Company and General Motors, outboard marine engines manufactured by Brunswick Corporation, and batteries manufactured by Duracell.

United States industries hurt by the gray market also include non-manufacturing concerns such as authorized importers and distributors. These companies also utilize significant numbers of United States workers in marketing and servicing their products. The U.S. watch industry, for example, employs more than 10,000 people in these capacities. These workers depend for their livelihoods on the ability of their companies to maintain the value of their trademark goodwill and to recover costs associated with development of that goodwill.

Indeed, COPIAT itself is comprised of United States companies employing more than two million workers. These include 225,000 workers of Pepsico, 35,000 workers at Dial, 765,000 workers of General Motors, 390,000 workers of IBM, 350,000 workers of Ford Motor Company, 35,000 workers of American Cyanamid and 18,700 workers of Brunswick Corporation. The continued employment of these and other U.S. workers depends on the ability of these companies to compete successfully in the United States and the world marketplace.

American companies and their American workers have been dedicating themselves to improving the quality of U.S. products. This has not been without sacrifice on the part of labor. Our U.S. produced brands can compete, however, if they can do so on a fair playing field. American workers can compete on the basis of quality and service. We can give consumers what they desire; a quality product at a fair price. Those who oppose the effort to halt the gray market practices grudgingly acknowledge that the gray market involves these factors. In fact, a consumer's choice of a branded product does involve much more than just dollars and cents. Value oriented consumers do buy based on the quality and support that the brand name product offers. These are, after all, the fundamental values of a trademark to a consumer and the very values of the trademark that the gray market erodes.

The quality and service that American workers and their companies offer through their branded products, that other part of the consumer's buying decision, is ignored, or worse, destroyed by the quick buck purveyor of gray market goods. The gray marketeer is not concerned if the consumer has a negative experience with a gray market product. His pride and expense have not gone into the brand name. Nor does he care about those who will be left unemployed as a result of displacement by the gray market.

American workers are willing and able to compete. American workers can and do make quality products and provide worthwhile servicing. We can not, however, fairly compete with gray marketears who would claim to offer our brand named products but are instead selling products of unknown origins, suspect quality and mysterious content. Gray market goods do undermine labor's contributions to the quality and service our brand names extend.

The gray market does not invest in American labor. Indeed, it is precisely the avoidance of the labor and other costs incurred by United States trademark owners and their authorized distributors in creating valuable trademarks that allows the gray marketeers to turn a profit. Unlike the authorized products that are displaced by the gray market sales, gray market goods are not manufactured, marketed, or serviced in this country in any meaningful way.

Food and Allied Service Trades, AFL-CIO

II. The Gray Market Contributes Materially to the Trade Deficit.

The United States trade deficit is one of the critical issues facing this country today and the gray market contributes markedly to this problem. It affects our competitiveness at home and abroad. The preliminary estimate for the 1989 merchandise trade deficit is $113 billion. The gray market has been estimated to account for as much as $6 to $10 billion in imports a year. [Collado Associates, Inc., The Economic Impact of Diversion (1984)] By rough figuring that means that the gray market contributed between 5 and 9 percent of the 1989 trade deficit.

The trade deficit does affect our jobs. A study by the Economic Policy Institute, examining the deficit and its impact in 1987, estimated that job loss due to the deficit ranged anywhere from 4.8 to 5.5 million jobs [Economic Policy Institute, Faye Duchin and Glen-Marie Lange, Trading Away Jobs: The Effects of the U.S. Merchandise Trade Deficit on Employment, (1988)].

We recognize that policy makers may differ as to the most effective way to manage our burgeoning trade deficit. At the same time though, we believe it is an outrage that gray market goods be allowed to contribute billions of dollars annually to our balance-of-trade problem while destroying the integrity of valuable trademarks and adversely affecting working Americans.

III. The Gray Market Facilitates Counterfeiting.

The United States Trade Commission estimates that this country looses almost $8 billion and 113,000 jobs annually due to counterfeits. This situation is further aggravated by the interrelationship between gray market and counterfeit goods. It has been well documented by law enforcement authorities that the gray market facilitates the importation and sale of counterfeit goods [See Affidavit of New York Police Officers Richard D. Breuer and James T. Golden (June 9, 1987)].

The present ambiguities in the law and the lack of a coherent national policy have left our borders wide open to the flow of most gray market products. This has provided a boon to product counterfeiters who simply produce counterfeits that appear to be gray market, or mix counterfeit and gray market goods in the same shipments, in an effort to slip them past the Customs Service. We believe that putting a stop to the gray market would go a long way towards addressing this job loss caused by counterfeit goods imports.

IV. The United States Will Be the Loser.

The present situation is serious for both American labor and American business. We are concerned that inaction by the Federal government will cause the situation to deteriorate further, costing even more American jobs in the process. In this regard, the recent experience of one particular company demonstrates dramatically the very serious problems posed for American workers by the gray market.

The story of Charles of the Ritz is a compelling and important one for policy makers to hear and consider. Once vital and thriving before the gray market, it is now gone entirely from our shores.

Charles of the Ritz was a wholly-owned subsidiary of the Squibb Corporation engaged in the manufacture and sale of various fragrances and cosmetics. As a result of a multi-million dollar development and marketing effort, Charles of the Ritz's Yves Saint Laurent "Opium" fragrance ranked second in U.S. perfume sales. As with any valuable trademark, "Opium" was the target of significant gray market activity.

Charles of the Ritz responded by spending millions of dollars on a laser coding system, hiring private investigators and implementing a computer tracking system. The company terminated its accounts of foreign distributors who sold to the gray marketeers, and it engaged in litigation both here and overseas to protect its trademark.

These herculean efforts by a single company were to no avail. Without a national policy prohibiting the importation of gray market goods, Charles of the Ritz could not -- at any price -- stem the massive flow of unauthorized gray market imports into the United States. Eventually, with the gray market comprising over 30 percent of the United States sales of its products, Charles of the Ritz was sold to foreign investors. Its U.S.-based operations were closed and 5,600 American workers lost their jobs.

No one benefited from the sale of gray market Charles of the Ritz products. In fact, consumers were confused and deceived by mislabeled goods, the business was dismembered, and once productive Americans were without livelihood.

Food and Allied Service Trades, AFL-CIO

Labor urges you to help other U.S. workers and their companies avoid the fate that befell Charles of the Ritz. S.626 would do this by protecting the intellectual property rights of United States trademark owners, the health, safety and expectations of U.S. consumers, and the jobs of American workers.

While Congress debates the issues of who and what is to blame for America's economic woes and faltering competitiveness, the gray market continues to flourish. As the gray market network grows, so too does the counterfeit network. Each contributes to the erosion of the branded products produced by Americans leaving currently productive workers unemployed. Additionally, the gray market destroys the efforts by American workers and their companies to enhance the desirability of brand named products by improvements in quality and service. Prohibiting gray market goods is a small but important step towards allowing American workers to compete fairly and retain their jobs. We are hopeful that Congress can take a stand now to save American jobs from this very real and very damaging threat to the livelihood of American workers and to our economy.

Food and Allied Service Trades, AFL-CIO

Senator DeConcini. Thank you, Mr. Boardman.

Ms. Foreman.

STATEMENT OF CAROL TUCKER FOREMAN, CONSUMER ADVOCATE, WASHINGTON, DC

Ms. Foreman. Thank you, I'm Carol Tucker Foreman, I'm a former executive director of the Consumer Federation and board member of Consumers Union. I am here today however, as a consultant to COPIAT. Mr. Chairman, gray-market goods depend upon consumer confusion and deception for their success, and that deception and confusion can result in health and safety risks to unsuspecting consumers. Although gray-market goods frequently differ from their U.S. counterparts, consumers are almost never advised that they are purchasing gray-market goods, frankly, it's not the sort of thing that retailers brag about. We should all be careful and educated consumers. We should closely examine labels and warranties and check consumer reports magazine before we purchase each and every item. If we did, we probably would never be fooled by a gray-market import. But few of us have time in our hectic lives to do that sort of thing. You know we rush home, into the store on the way home from work in the evening and grab up the tube of trademark toothpaste that served us well in the past, then we got home and find out that this time the trademark toothpaste isn't the one that we bought before and doesn't have the characteristics for which we sought it out. Few of us will ever have enough money to buy a Mercedes Benz as Senator Rudman mentioned, but everybody in this room is probably going to have purchased most of the items displayed here on the table, and the deception in those items is quite clear. Some supporters of the gray market argue that a labeling law like New York States' is the answer. Unfortunately, that law does not require gray marketeers to disclose physical differences between their products and authorized merchandise. The law has now been rejected by some of its original supporters. In fact, that labeling law puts an additional burden on consumers. Middle-aged folks like me, who have to drag out their reading glasses even in order to read speech type, would have to probably drag out a microscope in order to find the gray-market warning in that New York Times ad up there. If you can find it in less than 5 minutes, you win the prize.

There are numerous examples of health and safety risks posed by the gray market. In 1985 the House Commerce Committee uncovered a very serious widespread problem with diverted prescription drugs, and found that they resulted in the sale of "pharmaceuticals which have been mislabeled, misbranded, improperly stored or shipped and have exceeded their expirations dates." There are similar problems with cosmetics, a senior FDA official stated "gray-market cosmetics are a particular concern, because manufacturers of products not intended for sale in the United States have been known to include ingredients in their products which are not permitted in this country."

Supporters of the gray market say it provides price benefits to consumers, but they don't bring you any hard evidence to show that gray-market imports systematically lower U.S. prices. The claim of price savings is based on comparison of discount store prices, to regular retail store prices. If you compare apples and apples, that is discounted price of legitimate goods with the discounted price of gray-market goods, then you find that the price advantage disappears. And legitimate trademark goods are offered for sale in discount houses, including K mart.

Demarking is a reasonable way to resolve this problem. Many retailers sell generic or house brands, made by trademark holders. Sears Roebuck has done right well over the years selling house brands manufactured by trademark people. Men who oppose demarking have never experienced the joy of shopping at Loehman's or other women's stores across the country that advertise their products as manufactured by famous makers, labels removed. That can work for other products too. Demarking only hurts the seller who wants to deceive consumers, demarking would end that deception without ending the import of gray-market products, and demarking has one other terrific advantage, if you take the trademark off, you have a virtual guarantee that that product is going to be sold to the public at a lower price. Finally, Mr. Chairman, I'd like to associate myself with the testimony submitted by the National Consumers League endorsing S. 626. I'd also like to note that I've brought with me a very short, 3-minute video tape that examines some of these issues, and if you would like to see it at the end of our testimony or the end of the hearing, we would be glad to show it.

[The prepared statement of Ms. Foreman follows:]

BEFORE THE
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

STATEMENT OF CAROL TUCKER FOREMAN
CONCERNING S. 626
APRIL 4, 1990

Mr. Chairman and Members of the Committee, my name is Carol Tucker Foreman. I am a former Executive Director of the Consumer Federation of America and Board member of Consumers Union of the United States. From 1977-1981, I served as Assistant Secretary of Agriculture for Food and Consumer Services and continued to work on issues concerning food safety and accurate labeling. Since that time, I have been a public policy consultant with my own firm, Foreman & Heidepriem. Copies of my curriculum vitae will be provided to the staff.

I am here today as a consultant for the Coalition to Preserve the Integrity of American Trademarks. I first became interested in the gray market several years ago when COPIAT asked me to study the problem from a consumer perspective. I was struck then as I am now by the fact that the gray market depends upon consumer confusion and deception for its success, deception that can result in health and safety risks for unsuspecting consumers.

I have also been struck by the fact that although supporters of the gray market frequently assert that it provides price benefits to consumers, I have yet to discover any hard evidence that gray market imports systematically lower U.S. consumer prices. Moreover, even assuming for the sake of argument that the gray market has a beneficial price impact in the short run, this would be more than offset by the long-run consumer costs associated with cut-backs in investments in quality control, marketing, and distribution made by U.S. trademark owners and authorized distributors. Because gray market "free riding" reduces incentives to make these types of investments, consumers will be left with fewer products to choose from and less information about the prices and features of those articles that are available.

I. GRAY MARKET GOODS CONFUSE AND DECEIVE U.S. CONSUMERS.

One of the central purposes of our trademark laws is to protect the public from confusion or deception by providing purchasers with a quick and easy way to identify desired products. When a busy shopper buys a trademarked product, he or she expects to purchase a good with the quality, reliability, safety, and service that the trademark represents. Gray marketeers exploit these legitimate consumer expectations.

Although gray market goods may be physically identical to their U.S. counterparts at the time of manufacture, this often is not the case. Such physical differences occur because gray market goods are produced to foreign specifications and standards. In addition, laws in the country where they are manufactured and intended to be sold require that they be made with foreign materials different from those used in the United States. For example, Johnson & Johnson baby powder made in Brazil must include Brazilian talc which is different from U.S. talc. Even where gray market goods and U.S. trademarked products are physically identical at the time of manufacture, gray market merchandise may be less desirable by the time that it reaches U.S. consumers as a result of lower shipment and handling standards and deterioration in route. In addition, gray market merchandise is virtually never eligible for factory-authorized U.S. warranty service. Other common deficiencies include foreign-language instruction manuals and inadequate replacement parts and inventory.

Despite these very significant potential differences, consumers are almost never advised that they are purchasing gray market goods. Indeed, that the vast majority of consumers who purchase gray market merchandise are unaware that there is a difference between this merchandise and that it is not manufactured for sale in the United States.

We should all be careful consumers, examining labels and warranties carefully. If we did that and checked consumer reports before purchasing, we probably would not be fooled, but few of us have the time in our full schedules and hectic lives to do this -- even on major purchases. We should, but we do not. Most Americans live in two-income families with both partners juggling jobs, children's schedules, shopping and housework. We rush to stores and reach for a familiar trademark. We know Johnson & Johnson. We know Colgate. We have used these products before and like them. We do not have time and do not want to have to stop and examine every product with a microscope to make sure it is what we expected.

Some supporters of the gray market argue that consumer deception would end if the United States were to adopt a national labeling law similar to that in force in New York State.[1/] It should be observed, however, that the New York law is very limited in scope. It only requires disclosure where gray market goods are ineligible for manufacturer's warranties or rebates or lack English-language instructions. Importantly, the law does not require gray marketeers to disclose physical differences between their products and authorized trademarked merchandise. Thus, despite the fact the law was enacted in 1985, U.S. trademark owners continue to receive complaints from New York consumers who have mistakenly purchased gray market goods.

[1/] N.Y. CLS General Business Law § 218-aa.

The labeling law puts a further burden on consumers. Many middle-aged folks, like me, have to drag out their reading glasses. If some ads in the New York Times are an indication of how our labeling laws work, it may mean dragging out microscopes.

An effective labeling law would require gray marketeers to (i) prominently disclose all physical differences between the authorized and gray market products, and (ii) clearly explain the significance of these differences. It is doubtful that, as a practical matter, such disclosure is possible for many gray market products such as Mercury Marine outboard motors. In any event, significant federal funds would need to be made available to oversee compliance with such a law.

It would thus seem more reasonable to pursue the course suggested in S. 626.

II. GRAY MARKET GOODS POSE HEALTH AND SAFETY RISKS TO CONSUMERS.

There are numerous examples of health and safety risks posed by the gray market. Today, however, I want to draw the committee's attention to the one instance in which the gray market and the ambiguous problem of international diversion has been studied in detail by Congress. In 1985, the House Committee on Energy and Commerce uncovered a very serious, widespread problem with diverted prescription drugs.[2] See Staff of House Comm. on Energy and Commerce, 99th Cong., 1st Sess., Report on Drug Diversion (Comm. Print 1985).

The Committee found that the prescription diversion market "prevents effective control over even routine knowledge of the true sources of merchandise in a significant number of cases." Id. at 1 (emphasis supplied). It also found that, as a result, "pharmaceuticals which have been mislabeled, misbranded, improperly stored or shipped, have exceeded their expiration dates . . . are injected into the national distribution system for ultimate sale to consumers[,]" and that foreign counterfeiters are able to exploit the diversion market to slip their counterfeit pharmaceuticals past the Customs Service. Id. at 1, 3-6.

This is not a case of isolated "bad apples" as some supporters of the gray market would have us believe, but rather, "a thriving, multi-billion dollar market" in which unwitting U.S. consumers are forced, without their knowledge or consent, to take serious risks with their health. Opening Statement of Honorable Fred J. Eckert, Hearings on Prescription Drug Diversion (July 15, 1985). "Ironically, the

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2/ The drugs in question were produced in the United States but were only intended for sale abroad.

consumer reaps no discernible benefit from this risk --- the prices he pays are not significantly reduced . . ." Id.

While U.S. labeling laws and FDA safety and efficacy standards clearly applied to diverted prescription drugs at that time, these had not proven to be sufficient to stop the flow of mislabeled and misbranded merchandise into the United States. Accordingly, Congress passed additional anti-diversion legislation in the prescription drug area.

Similar problems have developed in the cosmetic field. However, these are not covered by the drug legislation. In this regard, a senior FDA official has stated;

> "Gray market" cosmetics are of particular concern because manufacturers of products not intended for sale in the United States have been known to include ingredients in their products which are not permitted in this country (e.g., color additives).

Letter from John M. Taylor, the FDA's Associate Commissioner for Regulatory Affairs (December 3, 1986). Thus, for example, 50,000 units of Oil of Olay imported through the gray market were recalled from the shelves of local retailers because they contained Red Dye No. 2, legal in the country of manufacture but banned in the United States. See FDA Reports, Toiletries, Fragrances, and Skin Care 7 (October 22, 1984).

Nor is this an isolated incident. In this regard, it may be useful to quote from a 1984 "Import Alert" promulgated by the FDA's Field Compliance Branch:

> Orlando District has identified a major labeling problem with imported cosmetics that are sold in the "Gray Market."
>
> Since these products are intended by the manufacturer to be sold in a foreign country, they are sometimes not labeled in English or in accordance with FDA's other labeling requirements, such as ingredient statements, net contents, etc.
>
> Unfortunately the products involved are not limited to a select few. Therefore coverage cannot be limited to certain products or certain countries and manufacturers.
>
> During fiscal year '83, Orlando detained 136 entries of cosmetics due to labeling deficiencies. A total of 52 firms were responsible for the 136 detentions. Of the 52 firms, 6 had 5 or more detentions, thereby establishing a pattern of continued violation.
>
> [T]he number of cosmetic entries offered in Orlando District has recently dropped drastically, suggesting that importers may be entering these products at other ports to circumvent FDA coverage.

Import Alert 53-05 Revised (May 22, 1984).

This Import Alert, which covers only one type of product in one Florida district, provides some idea of the magnitude of the problem. Because gray marketeers can select ports of entry at will, and because they can utilize a variety of front organizations to import gray market merchandise, it is virtually impossible to catch any but the most blatant or unsophisticated operations.

Although U.S. trademark owners and their authorized distributors have every reason to bring specific health and safety problems to the Government's attention, they are frequently unaware of these problems until after gray market goods have passed into the hands of U.S. consumers.[3] We should not wait until American consumers have been injured before taking action against gray market merchandise.

III. THERE IS NO EVIDENCE THAT THE GRAY MARKET PROVIDES SYSTEMATIC SAVINGS TO CONSUMERS.

Supporters of the gray market frequently assert that gray market sales result in lower prices for U.S. consumers. This assertion appears to be based upon the following assumptions: (i) that the prices charged to foreign distributors are lower than those charged to authorized U.S. distributors, and (ii) that gray marketeers pass on at least part of their cost savings to U.S. consumers in the form of lower prices. I am not aware of any evidence that supports either of these propositions.

There simply is no empirical evidence to support the notion of widespread price discrimination against the United States. More importantly, there is no evidence whatsoever

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3/ The sources of gray market shipments are deliberately, sometimes elaborately, concealed since such shipments are usually caused by a distributor, wholesaler, or retailer that breaches its contract with a foreign manufacturer. It is therefore disingenuous to suggest that serious health and safety problems do not exist simply because U.S. trademark owners are unable to provide advance information about gray market imports.

that gray marketeers willingly pass along a portion of their profits to U.S. consumers. On the contrary, they clearly charge as much as the market will bear. Indeed, many gray market products sell at or above the prices charged for legitimate U.S. trademarked products.

The gray market claims of price savings are based on their comparisons of discount store prices and full-priced retailers. Most, if not all of their claims would evaporate, if they would compare apples and apples, that is the discounted price of legitimate goods with the discounted price of gray market goods.

Indeed, we send staff out to purchase products at local outlets in order to learn more about the practical affect of the gray market. Many of these gray products are sold as if they were the legitimate product with no warning at all to consumers and at essentially the same price as legitimate goods.

Moreover, the fact that legitimate goods are readily available through many discount stores and catalogue showrooms undercuts the gray market claim that certain segments of the public would be denied access to products if the gray market were eliminated.

Nor have gray market supporters provided any empirical evidence that the elimination of the gray market would be inflationary. They simply assert that gray market imports force authorized U.S. distributors to lower their prices, and that if these imports are stopped, prices will rise. This economic model is simple and straight-forward, too simple. It completely fails to take into account the fact that the authorized merchandise must compete with other branded products and generic items.

Colgate toothpaste is not competing with imported gray market Colgate toothpaste, but rather, with countless other brands. All of the studies on this issue of which I am aware have concluded that in the vast majority of industries subject to gray market importation, producers face intense competition from other manufacturers of similar products. It is this vigorous _inter_brand competition and not the _intra_brand gray market competition that determines retail prices. This is clearly the case when such gray market personal care products as Dial soap and Johnson & Johnson baby shampoo which are sold in the same bin with authorized merchandise.

Moreover, in the one area in which Congress has acted to stop gray market imports (foreign luxury automobiles), prices are currently subject to more, not less, discounting. This is due, in part, to the increased interbrand price competition attributable to the introduction of the Toyota Lexus and Nissan Infiniti models.

Even assuming for the sake of argument that the gray market has a beneficial price impact in the short run, it may be more than offset by the long-run costs associated with the gray market. Gray market goods "free ride" on the goodwill created by U.S. trademark owners. While free riding is profitable for gray market importers and their foreign sources, it is bad for U.S. manufacturers, distributors and, more importantly, bad for American consumers.

When free riding is permitted, U.S. distributors soon learn that that when they succeed in promoting a product, gray market importers rush in to capture part of the benefit. This reduces, and in the extreme eliminates, their incentives to make marketing investments -- investments which, by keeping consumers informed of the attributes of different products, intensifying interbrand price and quality competition, and making entry of new brands easier, are as important to consumer welfare. The general result is that consumers may be left with fewer products to choose from and less information about the prices and features of those that are available. In certain situations, it may even result in higher long-term prices.

Further, it may lead consumers to stop buying the products. U.S. jobs may be lost as companies stop manufacturing certain brands. I have always held the quaint notion that you have to have an income before you can be a consumer. The consumer movement in this country has generally been concerned with the impact of unfair competition on workers. I hope that will continue to be the case.

IV. S. 626 IS AN EFFECTIVE AND WORKABLE RESPONSE TO THE GARY MARKET PROBLEM.

In light of the consumer confusion and deception and health and safety risks associated with the gray market, I strongly believe that additional action is needed to protect this nation's consumers. S. 626 provides an effective and workable solution to the gray market problem.

S. 626 would provide that, absent the consent of a U.S. trademark owner, no person may import into or sell within the United States any good that is manufactured outside the United States "if that good, or any label, sign, print, package, wrapper, or receptacle intended to be used upon or in connection with the sale, offering for sale, or distribution of that good" bears a trademark that is identical or substantially similar to a registered trademark owned by a citizen of the United States or a corporation or other entity created under the laws of the United States.

S. 626 is, in essence, a "demarking" statute. While it would permit U.S. trademark owners to require the Customs Service to prevent entry into the United States of those products manufactured abroad bearing U.S. marks, it would not prohibit the importation of any merchandise from which those marks had been removed or covered. The measure thus represents an eminently sensible solution to an extremely complex problem. On the one hand, it would protect consumers against confusion and deception as a result of the sale of branded gray market products. On the other hand, it would allow the importation of "off-brand," "house-brand," and "generic" products.

Supporters of the gray market sometimes assert that demarking would amount to a virtual ban on imports. This is manifestly not the case. Many companies, such as Sears & Roebuck, sell goods made by a U.S. trademark owner or an affiliate of a U.S. trademark owner under their own brand name or as generic items. In fact, Sears is currently running a television commercial which claims that over half the homes in America contain Sears house-brand appliances. Similarly, clothing discounters such as Loehmann's and Simms effectively market brand name clothing with labels removed. These are not isolated examples, but rather, evidence of a widespread practice affecting all types of merchandise throughout the United States. In this regard, I invite the Members of the Committee to visit Potomac Mills in Virginia or any of the many other "discount" outlet malls across the nation.

Nor would demarking remove valuable consumer information from the marketplace. On the contrary, it would remove misinformation -- misinformation that may confuse and deceive American consumers and put their health and safety at risk. There will always be a few individuals who are willing to misrepresent the origin of unbranded merchandise. There is, of course, no question that they should be punished to the fullest extent of the law. However, gray marketeers currently are misrepresenting the true origin of gray market merchandise to millions of Americans every day. S. 626 would put an end to this massive deception, and it deserves the Committee's full support.

Senator DECONCINI. Fine, then we will see it shortly.

Mr. DeMuth.

STATEMENT OF CHRISTOPHER C. DeMUTH, ECONOMIC CONSULTANT, WASHINGTON, DC

Mr. DEMUTH. Thank you Mr. Chairman. In the past several years I have conducted considerable economic research for the Coalition to Protect the Integrity of American Trademarks, which requested that I appear today. I have submitted this research along with my written testimony to the committee staff, and I would like this afternoon to summarize that research in the form of three general propositions. The first is that the economic motivation for gray-market importation could consist of either of two things; one, free riding off domestic marketing investments of U.S. product distributors who own the trademarks on the gray-market imports; or arbitrating price differences in international product markets where the prices to authorize U.S. distributors, those who own the trademarks, are appreciably higher to foreign distributors.

It was this second explanation that Senator Rudman emphasized in his testimony. But in my judgment, free riding is overwhelmingly the more persuasive explanation and accounts for the vast majority of gray-market imports. This conclusion is based on general analysis of the economic incentives for free riding and product arbitrage and on specific empirical evidence documented in my research. Under the current Customs policy, there are opportunities for free-riding importation whenever a product's domestic marketing investments for advertising, presales services, quality maintenance and alike, are greater than the costs of shipping those products to the United States from foreign sources. This is a common circumstance in the cases of watches, household sundries, cosmetics, cameras, consumer electronics, and similar products affected by gray-market importation. For these products, domestic U.S. marketing investments may be 10 times or more costly than per unit shipping costs into the United States. This suggests that the economic incentives for free-riding importation are extremely large in the absence of trademark enforcement. On the other hand, arbitrage can explain gray-market importation only where manufacturers are charging U.S. distributors appreciably more than they are charging foreign distributors. Such price discrimination is feasible, however, only where manufacturers possess significant market power in the United States and where U.S. demand for their products is less elastic than demand in foreign markets. These conditions are generally not present in the markets not affected by gray-market importation, which are characterized by numerous suppliers of similar products, aggressive price and product and quality competition and frequent market entry and exit.

Second, there is much casual assertion in the gray-market debates about the relative level of U.S. and foreign retail prices. There is no systematic evidence showing that U.S. retail prices are generally higher than prices abroad, and there is some good systematic evidence prepared, not by anyone associated with any side of this debate, but by reputable, indeed leading, academic economists, showing that U.S. retail prices are generally lower. But one could always find specific instances of either higher or lower U.S. prices. So I want to emphasize that such price comparisons are unimportant in distinguishing between free riding and arbitrage. The U.S. retail price of a product may be higher than foreign prices, even though the manufacturer sells the product to all national distributors for the same price, because, the product's U.S. distributor has invested more, or more successfully, in marketing the product than his foreign counterparts. In such cases gray-market imports are pure free riding and serve no arbitrage function. The U.S. retail price attributed to U.S. marketing costs exactly the return on investment that trademarks are supposed to protect by being larger than the costs of transshipping gray-market products into the United States.

This last point explains why the gray-market controversy is not confined to the United States, but also exists in Europe, Japan, and other developed economies. Whenever retail prices of internationally marketed products carry a large component of domestic marketing costs and trademarks are not enforced, third parties who can obtain those products sufficiently high up the foreign distribution chain will be able to free ride off the value of domestic marketing. The gray-market importation of the same types of products is general rather than a U.S.-specific phenomenon, a point that Senator Rudman explicitly emphasized, is in my judgment, clinching evidence for the free-riding explanation. If gray-market importers were international arbitragers, responding to price discrimination against U.S. markets, the gray market would be a one-way street going into the United States. The free-riding explanation on the other hand, predicts the gray-market importation will generally occur in all nations where trademarks are not enforced.

Finally, there is a pronounced tendency in the gray-market debates, for gray-market advocates to disparage the importance of trademark rights and the sorts of marketing investments they protect. I disagree with that. I think that in the modern information age, the importance of protecting investments that can communicate to consumers through the den of the information explosion, that can provide them with information on increasingly technological products is increasingly valuable. But if one is skeptical about the economic value of trademarks, one should propose weakening them across the board, not abolishing them for a subset of goods that are marketed internationally. I think it is paradoxical that gray-market importers who strongly oppose the demarking policy embraced in 626, should rest their opposition on a general assault on trademarks and enter brand competition. For if the economic importance of trademarks is really overblown, and if consumers really receive little of value from the sorts of marketing investments trademarks protect, then gray-market importers should be content with the policy that allows them to import products freely and sell them without their trademarks. That they should oppose demarking is evidence of the economic value of trademarks and evidence that gray-market imports are induced by free riding off this value, rather than by product arbitrage.

Thank you, sir.

[Executive summary and prepared statement of Mr. DeMuth follow:]

BEFORE THE
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

EXECUTIVE SUMMARY STATEMENT
OF CHRISTOPHER C. DEMUTH
CONCERNING S. 626
APRIL 4, 1990

Manufacturers distribute trademarked products through exclusive national distributors, rather than through numerous competing distributors in each country, because this is necessary to give distributors adequate incentives to promote their brands in competition with other manufacturers' brands.

Opponents of the gray market emphasize that gray market imports "free ride" on the domestic marketing and distribution investments of U.S. trademark owners. They also point out that many gray market imports are inferior in quality to the products of authorized distributors, and that the cost savings associated with supplying inferior products encourages gray market importation. Supporters of the gray market argue instead that gray market imports are caused by "international price discrimination" against the United States.

There is less economic data bearing on the gray market debate than one would wish for. Nevertheless, there are two general considerations that go a very long way toward resolving the gray market debate:

1) It should be observed that "free riding" is possible in a wide variety of contexts. All that is necessary is that the value added by U.S. marketing investments be greater than shipping costs to the United States. This is a common circumstance.

2) In contrast, international price discrimination against the United States is possible only in very restricted circumstances. Such price discrimination is feasible only to the extent that a manufacturer is free from competition in the market where he is charging the higher price. In other words, a manufacturer must possess a significant degree of "market power" over price (requiring a large share of all sales of the type of product in question). In addition, consumer demand for the manufacturer's product must be stronger -- less "elastic" -- in

the United States than elsewhere. Based upon extensive research, it appears that these twin conditions are seldom, if ever, present in the industries most frequently targeted by gray market imports.

These considerations strongly suggest that the gray market is primarily attributable to free riding rather than price discrimination. While free riding is profitable for gray market importers and their foreign sources, it is bad for U.S. distributors and, more importantly, bad for U.S. consumers.

Where free riding is permitted, U.S. distributors soon learn that that when they succeed in promoting a product, gray market importers rush in to capture part of the benefit. The general result is that investment is deflected away from developing, marketing, and providing presale services for products vulnerable to gray market importation, leaving consumers with fewer products to chose from and less information about the prices and features of those that are available. In certain circumstances, this can even result in long-term price increases.

Regardless of whether long-term prices increase because of the gray market, consumers will be worse off in any case. Where free riding cannot be prevented, market variety is unambiguously reduced; producers are unable to offer products with extensive marketing and presale services.

These potential problems are exacerbated where gray market imports are "inferior" in quality to the products of authorized distributors. The cost savings associated with such merchandise provides a powerful incentive to sell in the gray market. When consumers purchase inferior gray market products in the mistaken (but reasonable) belief that they are purchasing authorized trademarked goods, their losses are immediate and palpable.

Under Section 526 of the Tariff Act of 1930, trademarked products manufactured abroad may be imported into the United States only with the consent of the U.S. trademark owner. Despite the broad sweep of the statutory language, the Customs Service does not enforce the provision where a U.S. trademark owner is affiliated with foreign owners of the same trademark. It is readily apparent that the current Custom's policy is nonsensical under any view of the economic causes and consequences of gray market imports. The form of business organization between manufacturers and distributors in different countries has nothing to do with the potential for free riding, marketing of inferior quality products, or price discrimination against the United States.

Under a theoretically ideal (but obviously impractical) policy, import decisions would be based on case-by-case determinations as to whether prices paid by U.S. distributors are consistently higher than prices paid by foreign distributors for identical products. An approach that approximates this "ideal" policy, but at low administrative cost to the government and private parties, is to permit importation of trademarked products without the trademark owner's consent, but only if the trademark itself is removed or covered, i.e., "demarking."

Demarking is grounded in two principles whose economic merits have been proven in many other areas of law: well-defined property rights and well-informed consumer choices. Manufacturers would be unable to discriminate in price against U.S. markets under a demarking policy, because gray market importers could obtain such products abroad and sell them (demarked) in the United States, undercutting the price charged by the authorized U.S. distributors. However, demarking would oblige gray market importers to undertake some U.S. marketing and distribution efforts of their own, thereby diminishing the problems of free riding and inferior products. Moreover, demarking would protect consumers against unknowing purchases of gray market products, which would, in turn, give gray market importers proper incentives for monitoring the quality of their products.

BEFORE THE
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

STATEMENT OF CHRISTOPHER C. DEMUTH
CONCERNING S. 626
APRIL 4, 1990

Mr. Chairman and Members of the Committee, my name is Christopher C. DeMuth. I am here at the request of the Coalition to Preserve the Integrity of American Trademarks (COPIAT) to present testimony on gray market importation and on proposed legislation, S. 626, which would substantially revise current U.S. policy towards gray market imports.

I am president of the American Enterprise Institute for Public Policy Research, and must emphasize that my testimony should not be taken as an endorsement by the Institute of any of the views I am presenting; AEI is a nonprofit research and educational institution and takes no positions on legislation or other policy questions. I should also say that my testimony is entirely unrelated to my work at AEI. Before coming to AEI in December 1986, I was for several years a managing director of Lexecon, Inc., a private economic research and consulting firm. In that capacity I was the principal author of three research and policy studies Lexecon prepared for COPIAT. These are "The Economics of Gray Market Imports" (May 1985); "Gray Market Compromise: Demarking vs. Labeling" (September 1985); and empirical research submitted in a Treasury Department rulemaking proceeding in 1986 (United States Customs Service, Department of the Treasury, "Importations Bearing Recorded U.S. Trademarks: Solicitation of Public Comment on Gray Market Policy Options," 51 Fed. Reg. 22005 (June 17, 1986), Comments of the Coalition of Preserve the Integrity of American Trademarks, October 20, 1986). The purpose of my testimony is to summarize this research and explain its relevance to the policy issues the Committee is considering in connection with S. 626. Copies of the studies and of my curriculum vitae will be provided to the Committee staff.

I. Introduction -- Gray Market Importation

Gray market imports are products manufactured abroad which (a) bear lawfully applied (not "counterfeit") U.S.-registered trademarks and (b) are imported for sale in the United States without the consent of the U.S. trademark owner.

Gray market importation occurs where identical or similar trademarked products are distributed through exclusive national distributors in several different countries, and where one or more of those countries do not enforce domestic distributors' trademarks against products coming in from other countries. The resulting flow of "gray market" products between countries is the international equivalent of "transshipping" between marketing territories within the United States and other nations.[1] "Gray market importers" are those who purchase trademarked products from distributors, wholesalers, or retailers in one country and ship them to wholesalers or retailers in another country.

Manufacturers distribute trademarked products through exclusive national distributors, rather than through competing distributors in each country, because exclusivity gives distributors incentives to make adequate investments in marketing their brands in competition with other manufacturers' brands.[2] Other things being equal, manufacturers prefer competitive distribution, since this minimizes their costs of getting products from the factory to retail outlets.[3] But competing distributors of the identical product tend to shirk on promotion, quality-maintenance, retailer training, and other activities that build consumer awareness of the brand and its attributes -- since the returns from such investments, in the form of increased sales of the brand, will be shared with other distributors of the same brand. Exclusive distribution guarantees to each distributor the returns from marketing investments in his own territory (which is not to say that these returns will be positive, but only that the distributor will reap the benefits of his own marketing efforts when these are successful). The only alternative is for the manufacturer to give competing distributors marketing allowances and directions on how to spend them, and then to monitor these expenditures. But this is usually much less efficient than exclusive distribution, especially in international markets where monitoring is costly and national distributors are much better attuned to local marketing requirements than distant manufacturers.

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[1] See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Bulova Watch Company, 102 F.T.C. 1815 (1983).

[2] See R. Posner, "The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality," 48 U. Chi. L. Rev. 6 (1981); R. Bork, The Antitrust Paradox (1978) 280-98.

[3] To a manufacturer, distribution is an "input" to his final product sales, like the labor and materials that make up the product itself. Just as competition in the supply of labor and materials minimizes production costs, competition in the supply of distribution services minimizes distribution costs; both minimize the product's price and hence promote retail sales. A manufacturer who distributes through exclusive distribution in defined sales territories must therefore be getting something in return, and that something is more effective interbrand competition with the products of rival manufacturers -- producing a net increase in economic output. (As one would expect, manufacturers of unbranded commodities generally distribute their products through numerous competing distributors.)

In general, manufacturers will not knowingly sell to gray market importers who transship across marketing territories.[4]

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[4] Nor will they sell to their own distributors or wholesalers who are caught transshipping. Manufacturers enforce their exclusive distribution contracts in international markets as well as in the United States and other domestic markets -- for example by terminating wholesalers for breach of contract -- but this is much more difficult in international markets because monitoring costs are higher and because several nations, especially EC member nations, still employ trademark and antitrust doctrines to restrict the enforceability of exclusive distribution contracts, as the United States did before the Sylvania antitrust decision in 1977. See H. Kinkeldey, "Pitfalls of Trademark Licensing in the EEC," 72 Trade-Mark Rep. 145 (1982); Central Wine Buyers Ltd. v. Moet et Chandon Ltd., 2 Common Mkt. L.R. 166 (1982); Du Pont de Nemours, Common Mkt. Rep. (CCH) 9578 (1973).

Manufacturers may make occasional, irregular sales that circumvent their national distributors' marketing programs, but if they did this on a significant scale their gains from such sales would be more than offset by their losses from undermining the national marketing programs -- otherwise they would have chosen competitive distribution in the first place. Many manufacturers also sell "off-brand" or "generic" versions of their products to parties other than their regular distributors (often directly to large retailers who sell "house-brands"), but this does not jeopardize their distributors' investments in brand promotion. Gray market imports originate not with manufacturers but with national distributors, wholesalers, and retailers in other countries; in fact gray market products appear to be "sourced" primarily from intermediate wholesalers.

II. U.S. Gray Market Policy and S. 626

A reader of the United States Code would conclude that gray market importation does not exist in the United States. Section 526 of the Tariff Act of 1930 (first enacted in 1922, now codified at 19 U.S.C. 1526 (a)) provides, in terms about as clear as the English language permits, that it is unlawful to import foreign products bearing U.S.-registered trademarks without the consent of the U.S. trademark owner. Since the early 1970s, however, the Customs Service has enforced this provision only where the U.S. trademark owner is not affiliated with foreign owners of the same trademark, as where a U.S.

distributor is an independent licensee of a foreign manufacturer. In the more typical situations -- where the U.S. trademark owner is a subsidiary distributor of a foreign manufacturer, or is a domestic manufacturer who also manufacturers abroad -- products bearing his trademark may be imported for sale by third parties without his consent. This policy has been held to be a lawful exercise of administrative discretion by the Treasury Department.[5]

S. 626 would resurrect the trademark policy set forth in Section 526. The bill provides that, absent the consent of a U.S. trademark owner, no person may import into or sell within the United States any good that is manufactured outside the United States "if that good, or any label, sign, print, package, wrapper, or receptacle intended to be used upon or in connection with the sale, offering for sale, or distribution of that good" bears a trademark that is identical or substantially similar to a registered trademark owned by a citizen of the United States or a corporation or other entity created under the laws of the United States.

It is worth noting that S. 626 (like the current Section 526) is addressed to trademarks rather than to products themselves. While it would permit U.S. trademark owners to prevent third-party importation of products bearing their trademarks, it would not permit them to prevent third-party importation of the same products if the trademarks were covered or removed or replaced with other trademarks owned by the product owners. S. 626 is thus a "demarking" statute, and would permit continued importation and sale of "off-brand," "house-brand," and "generic" versions of products in circumstances such as those described at the end of the previous section. In this way, S. 626 would permit free importation of products whenever importers were willing to market them through their own promotional investments.

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[5] K Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988). The Customs Service restrictions on enforcement of Section 526 were apparently adopted at the behest of the Antitrust Division during the period, prior to the Supreme Court's Sylvania decision, when exclusive distributorships were considered a violation of the Sherman Act. See Posner, supra n.2. Administrative discretion aside, the Customs restrictions are a legal and economic anachronism -- to my knowledge the only remaining vestige of pre-Sylvania antitrust doctrine in U.S. law.

I believe that S. 626 sets forth the correct policy towards importation of products bearing U.S. trademarks. Compared to current policy, the bill would substantially improve the economic welfare of U.S. consumers and the performance of the U.S. economy. I also believe the best means of implementing the bill's policy -- the means in keeping with the appropriate division of labor between the Congress and the Executive Branch -- would be for the Treasury Department simply to adopt it under the current statute. But if the Treasury is unwilling to do this, I strongly support passage of S. 626. The remainder of my testimony explains why.

II. The Economics of Gray Market Imports

A gray market importer who sells to U.S. retailers in competition with the authorized U.S. distributor will incur some costs that the U.S. distributor does not. If the gray market importer acquires products from a foreign national distributor who purchased directly from the manufacturer, the importer will need to pay the distributor at least as much as the distributor charges wholesalers in the foreign country -- a price that includes the distributor's "mark-up" which is not paid by the authorized U.S. distributor in purchasing from the manufacturer. If the gray market importer acquires products from wholesalers, retailers, or others further along the chain of foreign distribution, he will need to pay additional mark-ups not incurred by the authorized U.S. distributor. And at any point in the chain of distribution short of retail purchase, the gray market importer will need to pay a "risk premium" over the source's alternative sale price, reflecting the fact that the source is violating his distribution contract and may be discovered and terminated.

If gray market importers are to compete effectively with authorized distributors, their differentially higher costs (just mentioned) must be at least offset by differentially lower costs somewhere else. And there are only two places where these lower costs might be found: gray market importers may pay less than authorized distributors for the products in the foreign "source" country, or they may spend less on marketing the products in the domestic (U.S.) "target" country.

Opponents of the gray market (such as COPIAT's member firms) argue that gray market imports "free ride" on the domestic marketing and distribution investments of U.S. trademark owners. They focus, in other words, on the profits earned by gray market importers who sell products bearing valuable, well-known trademarks, without having paid any of the costs of establishing and maintaining the market reputation of those trademarks. Gray market opponents also point out that gray market imports may be inferior in quality to the products of authorized distributors, and that the cost savings associated with supplying inferior products encourage gray market importation.

Supporters of the gray market (such as importers and retailers of gray market products) argue instead that gray market imports are caused by "international price discrimination" against the United States. They assert that many manufacturers (both U.S. and foreign) sell their products at higher prices in the United States than in foreign countries, enabling gray market importers to purchase products abroad at the lower price, ship them to the United States, and sell them here at prices equal to or lower than the U.S. price.

There is less economic data bearing on the gray market debate than one would wish for. Systematic comparisons of international price levels are hard to come by, and data on the sources of particular gray market shipments are usually impossible to obtain.[6] Nevertheless, there are two general considerations which go a long way toward resolving the debate over the causes of gray market importation and indicating the economically correct Customs Service trademark policy. These considerations strongly suggest that gray market importation is usually the result of free riding rather than price discrimination, and that the correct Customs Service policy is that set forth in S. 626 -- to enforce U.S. trademarks on products of foreign manufacture, while permitting importation of "demarked" products.

A. Free riding will generally occur when a product's transportation costs to the United States are less than its marketing costs in the United States -- which is a common circumstance.

It is important to understand that gray market importation may occur when U.S. prices are no higher -- and indeed even when they are lower -- than prices in other countries. Many who believe they have mastered the issue continue to believe that free riding depends on U.S. prices being somewhat higher than foreign prices. This is a mistake. All that is necessary is that the value added by U.S. marketing investments be greater than shipping costs to the United States.

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[6] The sources of gray market shipments are deliberately, sometimes elaborately, concealed since such shipments usually involve a breach of contract by the "source" distributor or wholesaler. My COPIAT research did, however, involve some empirical investigation of international price levels of trademarked products; the results, which supported the free-riding explanation, were included in Lexecon's May 1985 study ("The Economics of Gray Market Imports") and in COPIAT's submission in the Customs Service's June 1986 rulemaking proceeding.

To see why, imagine that a computer manufacturer sells his computer for $1,000 to all national distributors (in local currency equivalents), and that each national distributor then invests $200 per computer in domestic marketing, services, and distribution and resells to retailers for $1,250 per computer.

In this situation, any foreign distributor who can ship to U.S. retailers for less than $200 will earn more selling on the U.S. gray market than selling in his own domestic market. By free riding off the U.S. distributor's $200-per-computer service and marketing investment, the foreign distributor avoids having to make this investment himself in his home market, and pays only the (lower) transportation cost to the United States. If the cost of transportation to the United States is $100 per computer, the foreign distributor may find U.S. gray market sales more profitable than sales in his market even if the U.S. retailer price is up to $100 lower than the foreign retail price.

While this example is highly simplified, it illustrates several important propositions about free riding. First, free riding opportunities do not depend on U.S. prices being higher than foreign prices, but simply on the returns to U.S. product-marketing investments being higher than the costs of transporting those products to the United States. More precisely, when manufacturers' prices, domestic marketing costs, and retailer prices are the same in all markets, free riding will be profitable whenever U.S. marketing investments are higher than transportation costs to the United States. Free riding may be attractive even where U.S. prices are systematically lower than foreign prices -- it all depends on transportation costs and alternative profits from foreign sales. Thus, products whose shipping costs are modest relative to their marketing costs and "brand name value" -- watches, perfumes, cameras, consumer electronics, wines and spirits, and other products with high value-to-weight rations -- will be particularly vulnerable to free riding. As I discovered in my research for COPIAT, domestic marketing costs for such products are often an order of magnitude or more greater than transportation costs -- implying very large economic incentives for free riding importation.

Second, the greater the spread between U.S. marketing costs and transportation costs to the United States, the further along the distribution chain in other countries gray market sales will be profitable. In the extreme, where marketing costs and hence retailer prices are higher in the United States than in other countries (even though there is no price discrimination at the manufacturer level), foreign _retailers_ might even profit from free-riding sales to U.S. retailers. Thus, products that are unusually successful in the U.S. market will be particularly vulnerable to free riding.

Third, free riding opportunities may exist in both directions between two countries, but will be sensitive to changes in the relative values of the countries' currencies. In our simple example, the U.S. national distributor has the same economic incentives for making free-riding sales abroad as the foreign distributor has for making such sales to the United States. But free riding incentives are asymmetrical where marketing costs are higher in one country than another, since it is marketing investments (or, more properly, returns on marketing investments manifested in retailer prices) that are the primary source of free-riding profits. Marketing costs may differ between countries for any number of reasons, but one reason of particular importance is relative currency values. The services that go into product marketing, such as media advertising and wages of retail sales personnel, generally are not tradeable among countries to the same degree as products themselves; as a result, currency fluctuations will produce durable changes (that is, changes that cannot be eliminated through international trade) in relative marketing costs.

While free riding is profitable for gray market importers and their foreign sources, it is bad for U.S. distributors and, more importantly, bad for U.S. consumers. When free riding is permitted, U.S. distributors will soon learn that when they succeed in promoting a product, gray market importers rush in to capture part of the returns. This reduces, and in the extreme eliminates, their incentives to make marketing investments -- investments which, by keeping consumers informed of the attributes of different products, intensifying interbrand price and quality competition, and making entry of new brands easier, are as important to consumer welfare as investments in manufacturing the product itself. The general result is that investment is deflected away from developing, marketing, and providing presale services for products vulnerable to gray market importation, leaving consumers with fewer and less variety of products to chose from and less information about the prices and features of those that are available.

The effect of free riding on consumer prices is ambiguous. On the one hand, prices will tend to fall as authorized distributors reduce their marketing expenditures and these cost reductions are passed on to consumers; on the other hand, prices will tend to rise as interbrand competition becomes less vigorous and manufacturers produce at lower volumes (where unit manufacturing costs are higher). The effect of free riding on consumer welfare, however, will presumably be negative in either event. When free riding can be prevented, manufactures are still free to offer products without extensive marketing, presale services, and the like, and they will be successful with such "no frills" marketing strategies to the extent consumers prefer them. But when free riding cannot be prevented, market variety is unambiguously reduced --

producers are unable to offer products with extensive marketing and presale services, whether or not these expenditures benefit consumers. Put another way, if free riding does result in a sustained reduction in the price of a particular product, this can only be by reducing the authorized distributor's marketing expenditures -- expenditures consumers had been willing to pay for when they had a choice between that product and others with less extensive marketing. Finally, it is worth emphasizing that free riding may result in both reduced marketing services and higher prices.[7]

These problems are exacerbated where gray market imports are "inferior" in quality to the products of authorized distributors.[8] A gray market importer has a smaller incentive than the authorized distributor of the same product to avoid sales of inferior merchandise, because the costs of such sales -- injured market reputation and lost future sales -- are borne largely by the authorized distributor.[9] As a result, gray market importers will be less inclined than authorized distributors to make investments that affect product quality through careful handling and monitoring of inventory, avoidance of products unsuitable for U.S. markets, careful selection of retail outlets, and similar measures.

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[7] The empirical literature suggests that marketing investments tend to lower, not raise, prices. See Bureau of Economics, Federal Trade Commission, "Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry" (1980); L. Benham and A. Benham, "Regulation Through the Professions: A Perspective on Information Control," 18 J.L. & Econ. 421 (1975); L. Benham, "The Effect of Advertising on the Price of Eyeglasses," 15 J.L. & Econ. 337 (1972). Cf. L. Telser, "Advertising and Competition," 72 J. Pol. Econ. 537 (1964).

[8] For present purposes an "inferior" product is one whose quality is lower than consumers reasonably expect based on the brand's market reputation.

When consumers purchase inferior gray market products in the mistaken (but reasonable) belief that they are purchasing authorized trademarked goods, their losses are immediate and palpable. The harm to authorized distributors, who may be forced to bear the cost of replacing or repairing such merchandise in order to maintain the commercial goodwill associated with their trademarks, is equally clear. It should be emphasized, however, that while there will be a tendency for gray market imports to be "inferior" in the sense I am using the term, the economic harm from free riding does not depend on product inferiority and exists even where gray market products are identical in all respects to the products of authorized distributors. Even in these cases -- indeed especially in these cases -- gray market imports injure consumers by obliging distributors to limit investments in marketing and consumer-information activities vulnerable to free riding.

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[9] Gray market importers have a smaller stake than manufacturers and authorized distributors in the brand reputations of the products they import because their expected future sales of the products are smaller and less certain.

B. International price discrimination against U.S. markets is possible only in restricted circumstances, and can be addressed by permitting free importation of "demarked" products.

As discussed previously, supporters of gray market importation customarily assert that the economic inducement for gray market imports arises not from free riding or the sale of "inferior" products, but from international price discrimination -- from foreign manufacturers charging higher prices on sales to the U.S. market than on sales to foreign markets. True "price discrimination" (as defined below) among national markets may or may not be beneficial (output expanding) for the world economy as a whole, but it is generally harmful to consumers in nations where prices are higher than they would be under a uniform pricing regime. If gray market importers are simply arbitragers in international product markets, bring U.S. consumers the benefits of lower foreign prices without offsetting costs of diminished U.S. marketing investments or product inferiority, then their activities should not be curtailed. There is good reason to doubt, however, that price discrimination is a significant cause of gray market importation.

The term "price discrimination" is often used casually to describe any situation where two consumers pay different prices for a product, regardless of differences in costs of supply. This usage has no economic content. True price discrimination occurs where a seller sells his product to different customers (such as a manufacturer to different national distributors, or a national distributor to different wholesalers) for different prices after taking account of differences in transportation, distribution, and other costs of supply.[10]

One must be careful, therefore, about assertions that gray market importation is an arbitrage rather than free riding phenomenon wherever U.S. prices are higher than foreign prices. Gray market supporters frequently offer the following formulation: (a) U.S. retail prices are characteristically higher than retail prices for the same products in other countries; (b) this amounts to "international price discrimination" against U.S. consumers; (c) gray market importation is therefore an arbitrage phenomenon beneficial to the United States.

The premise of this syllogism is unproven and I believe it is wrong. There is no systematic evidence that U.S. retail prices are generally higher than those in other advanced economies, and there is some evidence (cited in my COPIAT research) that they are generally lower. For every cocktail party anecdote about shopping bargains in Rome there is another one about shopping horrors in London or Tokyo; the current trade debates have produced studies showing dramatically higher product prices in Japan than in the United States.

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[10] Thus, if a computer sells for $1,000 to distributors in Italy and the United States, and the Italian distributor spends $100 but the U.S. distributor spends $200 per computer in domestic marketing and promotion, and the computer retails for $1,200 in Italy and $1,300 in the United States, there is no "price discrimination" involved. In this case the computer's international (manufacturers') price is no higher to the United States, but the costs of marketing in the United States are higher and the U.S. retail price reflects these higher costs. Gray market imports from Italy will have no arbitrage affect in this case; they will merely free ride off the U.S. distributor's (presumably competitive) marketing investments and force a reduction in these investments.

But even taking the premise as true, this formulation of "price discrimination" is wrong and indeed perfectly confounds price discrimination and free riding. For while a manufacturer's costs of producing and delivering the identical product to two different countries may be assumed to be identical (ignoring differential shipping costs for the sake of argument), there is no reason to assume that domestic marketing costs will be identical in the two countries -- and marketing costs affect retail prices just as much as manufacturing costs, and are particularly important in the case of the sorts of trademarked products involved in the gray market debate.

Imagine, for example, that a manufacturer's product price is $100 to all national distributors; that his Brazilian distributor invests $20 in marketing and sells (to wholesalers or retailers) for $125; and that his U.S. distributor invests $25 in marketing and sells for $130. Gray market importation from Brazil to the United States will then take place if transportation costs are low enough, but the imports will perform no arbitrage function whatever -- they will be pure free riding off the U.S. distributor's marketing investments.

The U.S. distributor's costs may be higher than those of his Brazilian counterpart because he provides a higher level of retail services and warranty coverage, because he spends more on informing U.S. consumers about his product and consumers are responding positively, or simply because the domestic services that go into product distribution are more costly in the United States than in Brazil. But in any event gray market imports will injure, not benefit, U.S. economic welfare. They cannot lead to lower import prices from the manufacturer to the U.S. distributor (these are already as low as prices to other countries, and presumably equal to costs of supply), but they will lead to reduced U.S. marketing investments and this in turn will lead to reduced product information and variety in the U.S. market. Finally -- an important point for evaluating the Customs Service's current gray market policy -- it makes no difference whatever if the manufacturer and distributors are a single multinational firm (affiliated by corporate ownership) rather than independent firms (affiliated by license contracts); if a multinational firm experiences different costs of marketing or different returns on marketing investments in different countries, it is not engaged in price discrimination.

We are left, then, with the possibility of true international price discrimination -- differences in manufacturers' prices to national distributors unjustified by differences in transportation or other supply costs. If these price differences are great enough, they may offset the gray market importer's higher costs of acquiring products from subsequent stages in the foreign chain of distribution, and stimulate gray market imports from "lower price" countries to "higher price" countries beneficial to the latter.

It is unlikely, however, that price discrimination is an important cause of gray market importation, for two simple but powerful reasons. The first is that price discrimination is a special monopoly phenomenon -- it is feasible only in circumstances where (a) a seller possesses substantial market power (freedom from competition from rival sellers) and (b) the price elasticity of demand for his product is higher in one market (the market where he charges the higher price) than in other markets.[11] A manufacturer facing competition from rival suppliers of substitute products cannot engage in price discrimination: his rivals would profit by undercutting his price in the higher-price market, thereby forcing him back down to the competitive price. And even a manufacturer with a complete monopoly will sell at a higher price in one market only if consumer demand in that market is appreciably less elastic than demand elsewhere.

These conditions are rare as a general matter and quite implausible in the markets subject to gray market importation -- cameras, batteries, cosmetics, watches, and other products characterized by numerous sellers, low concentration, vigorous interbrand price and quality rivalry, and frequent market entry and exit. Nor is there any reason to think that U.S. demand for these products is systematically less price elastic than demand in Western Europe, Japan, and other relevant foreign markets. But without substantial market power and relatively inelastic demand in the United States, true price discrimination against our markets, and hence a plausible beneficial function for gray market importation, is impossible.

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[11] See G. Stigler, The Theory of Price (4th ed. 1987) 210-15.

The second reason for doubting the price discrimination explanation is that, if it were true, one would see gray market importation into the United States (the presumed "higher priced" market) but not into other countries (the "lower priced" markets). Instead, gray market importation is an international phenomenon -- existing, and provoking heated policy debates, in Europe and Japan as well as the United States, and involving the same products as in the United States. This is obviously inconsistent with the notion of gray market imports arbitraging higher U.S. prices, but it is perfectly consistent with -- indeed is predicted by -- the free riding explanation. As explained in section II-A above, free riding transshipment across national sales territories can and will take place in all directions simultaneously, so long as marketing costs in "target" markets exceed shipping costs to those markets.[12]

Although price discrimination is not, in general, a persuasive explanation of gray market importation, this is not to say that price discrimination never exists in the markets in question or that gray market importation has no possible utility in eroding occasional instances of discrimination. But where it does exist and is substantial enough to be corrected by international product arbitrage, it may be addressed by permitting *unrestricted importation of demarked physical products* -- thereby permitting arbitrage to erode the price discrimination affecting the products themselves while eliminating (or at least reducing) free riding on the brand reputations associated with the products' trademarks. Thus, where a foreign manufacturer possesses effective monopoly power in a U.S. market and is able to exploit that power by charging a higher price for its product in the United States than elsewhere, this pricing power could be eroded by permitting third parties to import and sell the product independently, securing products at lower prices abroad and marketing them in the United States under their own trademarks and through their own marketing investments. This, in essence, is the "demarking" policy embraced by in the current Section 526 and in S. 626. The economic logic of the policy is that it confines the trademark owner's property right to the trademark itself rather than the physical product, while permitting free importation of the physical product without the trademark. In this way, a demarking policy guarantees -- not perfectly, but approximately -- distributors the returns on their brand marketing investments, without protecting returns on market power (power to charge supra-competitive product prices) which manufacturers may possess.

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[12] International currency fluctuations may, however, affect the flow of gray market imports by increasing the value of marketing expenditures in nations with relatively "strong" currencies as measured in foreign currencies. One would expect, therefore, free riding gray market imports to increase with the relative appreciation of a nation's currency. While there is no systematic evidence linking the volume of U.S. gray market imports positively to the value of the dollar, all sides of the debate seem to agree that this is so. If it is so, it is yet another reason for thinking that free riding rather than international price discrimination is the cause of gray market importation. The appreciation of a nation's currency should have no systematic effect on the opportunities for price discrimination against that nation -- on the market power of foreign producers or on the elasticity of demand for their products.

IV. Prices of Gray Market and Authorized Products

A common but mistaken assumption in gray market debates is that gray market imports sell for lower prices than the products of authorized distributors. The assumption confuses costs with prices, and is worth correcting here because it also confuses the costs and benefits of enforcing trademarks against gray market imports.

Where two products are identical in quality and appearance they will tend to sell for the same price in the same market; indeed a market is, by definition, the area where price is determined and where prices of different sellers fluctuate in tandem.[13] The various sellers in a market will almost always have somewhat different costs of production, but these differences do not yield different prices: lower cost suppliers do not give away their cost advantages to consumers, but sell at the market price and earn "economic rents" for themselves. If a wheat farmer owns land that is unusually well suited to wheat farming, he will earn higher returns from his land, not sell wheat at less than the market price. And an individual who inherits a gold mine will not sell the gold for a price that just covers the cost of mining it.

This does not mean that identical products always sell for precisely the same price. Because price information is itself costly for producers to supply and consumers to acquire, there is typically a dispersion of prices in any market, with most prices clustered around a mean and fewer prices progressively higher and lower than the mean.[14] This would be true of a survey of retail prices for a highly homogenous product, for example twelve-ounce cans of Pepsi-Cola for sale in the Washington, D.C. metropolitan area. It does mean, however, that when gray market products are identical in appearance to the products of authorized distributors, they will tend to sell in the same price range. To suppose otherwise is to suppose that gray market importers are gratuitously giving away their lower costs (from free riding, lower quality-control costs, or arbitraging international price differences) to consumers rather than keeping these savings for themselves; such altruism is presumably no more prevalent in gray markets than other markets.

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[13] See G. Stigler and R. Sherwin, "The Extent of the Market," 28 J.L. & Econ. 555 (1985).

[14] See G. Stigler, "The Economics of Information," 69 J. Pol. Econ. 213 (1961).

Of course, the irregular nature of some gray market products may be apparent to consumers -- as where product packaging bears foreign-language instructions, or where consumers have become generally aware of gray market importation (as in some retail camera sales in New York City) -- and in these cases gray market imports will indeed sell for a discount. But here consumers are aware they are buying a "different" product, one that has some but not all the attributes of the authorized product: the discount reflects the lower value of the product, not the gray market importer's lower costs.

The interesting price issue is a different one -- whether the presence of gray market imports leads to lower prices for all versions of a product, gray market and authorized. As discussed earlier (in section II-A), there is no unambiguous answer to this question. In the short run, gray market imports may lead to generally lower prices by increasing the quantity of products being offered for sale. This, however, is simply free riding at work, eroding the economic returns of authorized distributors' marketing investments by lowering their prices. In the longer run, as authorized distributors respond by cutting back on their marketing investments, and as market demand for their products falls, prices could be either higher or lower than in the absence of gray market imports. (Prices will be higher, for example, if unit production costs are higher at lower levels of production, or if interbrand price competition is less vigorous when producers spend less on informing consumers about their products.) In either case there will be fewer products from which to choose, and consumers will be less informed about those that are available.

The important conclusion to draw from this discussion is that gray market policy should be considered as a specific application of intellectual property policy. If all U.S. trademark laws were abolished tomorrow, one would observe a short-run decline in the price of identified brands of products -- as anyone could market products of any cost and quality and call them "Crest" toothpaste, "Wheaties" cereal, or "Chevrolet" automobiles. In the longer run, consumer prices for toothpaste, cereal, and automobiles might be either higher or lower in such a world of "generic products only." But regardless of the price effect, consumers would be poorer than before trademark rights had been abolished. In a world of enforceable trademarks, producers are free to sell "generic" products at bargain prices, and will take business away from branded products to the extent consumers find generic products preferable. But in a world without trademarks the consumer's options are more limited, because no producer can adopt the alternative strategy of marketing products with unique attributes identified with a unique trademark.

V. The Economic Illogic of Current Gray Market Policy

Under Section 526 of the Tariff Act of 1930, trademarked products manufactured abroad may be imported into the United States only with the consent of the United States trademark owner. As noted at the beginning of this testimony, the Customs Service does not enforce the statute where a U.S. trademark owner is affiliated with foreign owners of the same trademark. Gray market imports are permitted where (a) both the foreign and U.S. trademark are owned by the same person or business entity, or (b) the foreign and domestic trademark owners are parent and subsidiary companies or are otherwise subject to common ownership or control. Corporate affiliation is the usual form of organization where distributors operate in large national markets, so the Customs Service policy is one of *de facto* trademark nonenforcement, except for products with relatively small U.S. markets.

I want to note here that the Customs Service policy is nonsensical under any view of the economic causes and consequences of gray market importation. The form of business organization between manufacturers and distributors in different countries has nothing to do with the potential for free riding, marketing of inferior quality products, or price discrimination against the United States. A foreign manufacturer who distributes through an independent licensee in the United States could still engage in price discrimination if circumstances permitted (if he had monopoly power and if U.S. demand was less elastic than demand in other countries). Similarly, U.S. manufacturers who distribute abroad through subsidiaries, and foreign manufacturers who distribute in the United States through subsidiaries, are still vulnerable to free riding if their U.S. marketing costs are large enough and shipping costs to the United States are small enough. The distinctions set forth in the Customs Service regulations simply have no relationship to the economics of gray market importation.

VI. Conclusion -- Toward an Ideal Gray Market Policy

Gray market importation may, in theory, occur for one or more of three reasons: (a) free riding on the market investments of U.S. trademark owners, (b) selling "inferior" versions of trademarked products, or (c) arbitraging price discrimination against U.S. product distributors by foreign or domestic manufacturers. Free riding and selling "inferior" products are harmful to American consumers; arbitraging price discrimination against U.S. markets is beneficial to American consumers. But free riding and selling "inferior" products are far more important and widespread causes of gray market importation than arbitraging price discrimination.

These considerations argue for a much broader application of the trademark laws than under present policy, but they do not suggest that gray market policy must focus exclusively on free riding and "inferior" products and ignore price discrimination. For price discrimination may be costly to the United States in some instances, and it is possible to address the problem while closing off the current, wide-open opportunities for free riding and sale of "inferior" products.

Under a theoretically ideal (but obviously impractical) policy, import decisions would be based on case-by-case determinations whether prices paid by U.S. distributors were consistently higher than prices paid by foreign distributors for identical products. An approach that approximates this "ideal" policy, but at low administrative cost to the government and private parties, is to permit importation of trademarked products without the trademark owner's consent, but only if the trademark itself is removed or covered.

Demarking is grounded in two principles whose economic merits have been proven in many other areas of law: well-defined property rights and well-informed consumer choice. Serious price discrimination against U.S. markets would be impossible under a demarking policy because the precondition of discrimination, monopoly power, would be undercut: importers could obtain the lower-priced products abroad and sell them in the United States, demarked, at prices undercutting those charged by authorized distributors. However, demarking would oblige importers to undertake some U.S. marketing, presale service, and quality maintenance efforts of their own, thereby diminishing the problems of free riding and "inferior" products. Last and by no means least, the demarking policy would elimate importation induced by opportunities for free riding off valuable U.S. marketing and related investments, which is far and away the most significant cause of gray market importation.

In view of these advantages, I strongly urge the Members of this Committee to support the enactment of the trademark enforcement and demarking policies embodied in S. 626.

Senator **DeConcini**. Thank you, Mr. DeMuth.

Ms. Foreman, how long is the film?

Ms. **Foreman**. It's less than 3 minutes, sir.

Senator **DeConcini**. I think we can afford that. Go ahead, please.

[Video presentation made.]

Senator **DeConcini**. Thank you very much.

Let me ask you, Ms. Foreman—I wanted to start with you—it has been emphasized by others as well as yourself that gray-market products may pose a detriment rather than a benefit to the consumer. I take your comments very seriously, because of your past experience with product labeling and product quality. However, other consumer groups argue and testify that this is really good for the consumer, that a well-educated consumer should be able to ask questions, put on their reading glasses and make a decision, and they can buy for less, and then they will point to some examples.

How do you explain the wide divergence of opinion among consumer groups as to the support of this bill or the opposition to this legislation?

Ms. **Foreman**. Well, I think in part it's those of us who deal in the real world, and I think the real world is represented there on that table. Certainly we should be educated consumers, and when you go out to make a Mercedes Benz purchase, then you've probably explored that very, very thoroughly. I think that consumers have always relied on trademarks to be able to save time and energy in the store. It is a shorthand, it says you don't have to read every single thing in the label every time you buy the product, you should be able to buy the product once or twice and know that it's going to be essentially the same thing the next time out. So I view trademarks not as the province totally of American business, but as a service to American consumers. Let me point out too about the divergence of products from country to country, because some of these people who support gray market will argue, well, the companies should not be manufacturing this product differently in another country. The fact is that it gets manufactured differently in other countries for a variety of reasons. One is that local standards may vary. Some countries only allow red dye No. 2 and we don't allow red dye No. 2, so it depends on the laws of the nation, and there is some dispute over safety. It depends on local politics as Mr. Boardman pointed out, with domestic content. Johnson & Johnson is required to use Brazilian talc, when it manufactures in Brazil, and you can't sell Johnson & Johnson Baby Powder in Brazil if you don't manufacture it in Brazil. That's really not Johnson & Johnson's fault. That product wasn't intended to come in here. Finally, you respond to local needs. We have toothpaste up there that is manufactured for sale in Guatemala where the water supply is not fluoridated. It has a very heavy load of fluoride in it. If you bring it into the United States and use it frequently you might ultimately damage your teeth. Some folks would tell you, well the FDA ought to keep that out, and I'd tell you that there is a lot of things the FDA ought to do that they've never gotten around to doing.

Senator **DeConcini**. Maybe Mr. Edley can answer this. Why would Pepsi Cola or Coca Cola not want to have the same ingredients and the same contents in their product if they can, when it's manufactured in another country?

Mr. **EDLEY**. Well, in some cases they do have the same ingredients, Mr. Chairman, and the problem for consumers may be that in the transshipment, the product is sitting on a dock and it gets overheated, and you open up the can and it doesn't taste the same. It's a different size and all the rest of it, but more to the point of your question, it's really what Ms. Foreman was saying, that these companies have an obligation if they're going to be competitive in those foreign markets, to design their products in way that meet the consumer tastes and consumer expectations in that market. That's why trademark is essentially a territorial concept, and just as they're an investment in product development in Brazil or Guatemala or in the United Kingdom, there are investments here. Our consumers deserve to have their expectations satisfied.

Senator **DECONCINI**. Then the next question that comes to my mind, given that is the answer, then why doesn't the manufacturer have a trademark for Brazil, why don't they call it "Johnson & Johnson Plus" and advertise it as "Johnson & Johnson Plus?" Then it is a little bit different, and it still has Johnson & Johnson, but has a "plus" on it, or it has a blue label.

Mr. **EDLEY**. The experience of our members, and there has been some experimentation of that sort, is that it just doesn't work. In the first place it is—this was tried for example, I believe it was Colgate has tried this. Minolta has tried a similar type of strategy, and U.S. consumers simply do not make that distinction. They don't know that because it says Johnson & Johnson Plus, or because there's a little American flag on the Minolta camera, they don't know that that indicates it might have been made for one market but not for another market. All they know is that it says J&J, and it says Minolta, and there it is—I'll buy it, and deception results. There is one problem. The second problem, of course, is that in this international economy, it would be extremely difficult for these companies that are trying to compete all over the world, to devise new names and new product identities in every single market. Can you imagine how you would advertise at the Olympics, if you have to have a different name for your products?

Senator **DECONCINI**. Yes, that's true, but what troubles me about it is, that if you have a standard and a trademark for Pepsi Cola, and then you sell it, and it's not Pepsi Cola in Brazil or Afghanistan, maybe it should be called something else.

Mr. **EDLEY**. Well, but it is Pepsi Cola in Brazil, it is Pepsi Cola in Afghanistan in that market——

Senator **DECONCINI**. But it's different than the Pepsi Cola in the country that you have the problem with.

Mr. **EDLEY**. That's correct, and the simple remedy here of demarking would take care of that. If the gray marketeer wants to arbitrage the products, wants to divert the products and bring them into the United States, the solution represented in your bill is a very simple one. We'll take on the competition, but let us stop the deception and the free riding.

Senator **DECONCINI**. Mr. Boardman, you talk about the loss of jobs; how many jobs do you think are lost. Is there any estimate at all by anybody?

Mr. BOARDMAN. The trouble with the gray market, Senator, is even though there are estimates about the extent they exist, there are no estimates exactly, because it so fluid about which industries have been affected and the extent of jobs. As I alluded to in my testimony, the relationship between the trade deficit and job loss is evident, and the relationship between the gray markets as percentage of the trade deficit is evident. So we can extrapolate a little bit.

Senator DECONCINI. Mr. DeMuth, it has been said that many other countries, particularly in Europe, don't fight the gray markets like we do or, as a matter of fact, that they almost encourage it. Is that accurate, or do you know the answer to that question?

Mr. DEMUTH. The policies and Senator Rudman mentioned the decision in Japan, if you looked at the decision in the EC countries, you would find similarly that the current policy is close to that of the United States. That is to say, they permit gray-market importation, that does not mean that it's not being fought as it is in the United States. It is a controversial issue. There are trademark owners there as there are in the United States that would like their property rights enforced. It's a fluid situation, and it might change, and I have to emphasize that the fact that we see this happening all over is very strong evidence that what is going on is free riding off marketing investments in each country, rather than some kind of phenomenon related to higher prices in the United States.

Senator DECONCINI. You know it occurs to me that one of the biggest problems is the fact that the importers that are bringing it in don't get a license. Maybe if they got a license, do you think that would make any difference—I mean with the trademark owner—if they went to them and said, hey, we want to bring in Brazilian talcum powder, Johnson & Johnson, and we'll pay you a fee for that. Do you think Johnson & Johnson would let them do that?

Mr. DEMUTH. You find in domestic markets and in international markets, in some cases the manufacturer will want to have exclusive distributors, and in other cases a manufacturer will want to have competing distributors. Just looking at it in the first instance, a manufacturer would rather have lots of people hocking his wares. You tend to do better, and it lowers your price of distribution and so forth. Why is it that you find in markets such as these that manufacturers are limiting themselves to a single distributor? It's because these are products that rely upon a good deal of nation-specific advertising—in the case of some of these products, a lot of presale services, trained retail sales clerks—those require heavy investments by the national distributor. If you have competing distributors you're going to have a lower level of investment in those kinds of activities. So I think that, in general, you would find, since we know that the manufacturer has decided that he's going to sell more products, output would be larger. More consumers will select his or her brand through exclusive distribution. They'll want to hold to that. But under demarking, if somebody wants to obtain the physical product the way Sears Roebuck does, you can open today's Sears Roebuck catalog, you can find VCR's, cameras, that look a lot alike and you can tell that they're the same as some branded cameras, that Sears Roebuck is selling and standing behind them. Under demarking I think that you'll still find a lot of hard discounting, but rather than using gray-market products, people will be selling them as their own house brand or as unbranded products.

Senator DeConcini. Thank you very much.

I presume Senator Hatch has questions he wants to submit. Senator Grassley has a statement that will appear in the record.

Thank you very much for your testimony. I have some questions I'd like to submit too, but due to time, we'll not go into them.

[Responses of panel members to questions submitted by Senators DeConcini and Grassley follow:]

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April 30, 1990

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator DeConcini:

Christopher Edley, Jr. requested that we submit his answers to the supplemental questions that he received from the Committee concerning S. 626, the Trademark Protection Act of 1989. His answers are enclosed accordingly.

Sincerely yours,

Eugene A. Ludwig
Scott D. Gilbert
David R. Grace

Enclosures

Answers to Chairman DeConcini's Supplemental Questions on S. 626, The Trademark Protection Act of 1989

1. (Edley) In your testimony you describe the potential product differences that consumers face when they purchase gray market products. These product differences are of particular concern in products that are ingested, such as beverages, or applied, such as cosmetics, where consumer safety is especially important.

Proponents of the gray market claim that few, if any, differences exist between gray market and U.S. authorized products. Can you estimate for us the percentage of gray market products in which there is a difference from the U.S. manufacturing standard?

Gray market goods are never intended for shipment to or consumption in the United States. As such, they are almost always different from United States trademarked products in one or more important respects.

Gray market goods frequently differ from authorized products because they are produced to foreign specifications and standards (*e.g.*, toothpaste, toys, outboard motors, soaps, detergents) or use foreign local content (*e.g.*, baby products, beverages, some computer and cosmetic products).

A related problem exists with respect to precision products, such as watches, that must have certain internal markings in order to be imported legally into this country. *See* 19 C.F.R. § 11.9. Because gray market watches are not manufactured for importation into the United States, they frequently lack the required markings. Gray market importers therefore must open and mark the watches themselves, often in uncontrolled and unsterilized environments, thereby greatly increasing the risk of defective performance.

Even where gray market goods and U.S. trademarked products are physically identical at the time of manufacture, gray market merchandise is often less desirable by the time it reaches U.S. consumers as a result of lower shipment and handling standards and deterioration in route. This phenomenon is most clearly apparent with batteries, film and some beverages. *See* *Certain Alkaline Batteries*, Inv. No. 337-TA-165, USITC Pub. 1616 (1984).

In addition, gray market goods are virtually never entitled to factory-authorized warranty service in the United States. This is invariably a problem in the area of consumer electronics, cameras, and watches.

Another common deficiency involves foreign-language instruction manuals and safety notices. These differences can be of critical importance. Due to a lack of English language and/or U.S.-use-appropriate instructions or safety notices, consumers can be seriously injured from gray market imports. This problem has been most troubling with respect to motors, toys, fork lift trucks and other motorized machinery.

Finally, gray marketeers often lack proper replacement parts and replacements of the item itself. This problem arises in the area of consumer electronics, crystal, China, and flatware.

In summary, it is readily apparent that there will likely be important differences between gray market goods and their authorized counterparts in virtually every case.

2. (Edley) I am also concerned about the lack of warranties on gray market goods. Are there adequate warranty protections on gray market products and why do the manufacturer's warranties not apply to gray market goods?

Gray market goods are almost never entitled to factory-authorized warranty service in the United States. This can be expensive for consumers. For example, the minimum service charge on some professional cameras is $300.00. Gray market warranties are no substitute; not only must the consumer often pay for gray market warranty service (sometimes characterized as a "handling charge") when on occasion such service is available, but such gray market service as is available does not involve factory-trained technicians.

Manufacturers warranties do not apply to gray market merchandise because it is handled and shipped under conditions outside the manufacturers' control. As discussed in detail in my written statement, gray market goods are not subject to the inspection, transit and quality controls of U.S. trademark owners and their distributors. As a result gray market batteries may have a shortened life, photographic film may deteriorate due to improper temperature controls during transit and detergent may be ruined by excessive moisture from packaging inadequate for overseas transshipment. Similarly, cameras, watches and electronic equipment may suffer internal damage not readily detectable by the consumer at the point of sale. See, id.

Under these circumstances, manufacturers cannot be expected to offer warranties on gray market goods. Even so, from time to time, some U.S. trademark owners choose to service such goods in order to protect the goodwill associated with their authorized products.

3. (Edley) Could you please explain further why U.S. trademark owners are unable to stop the importation of gray market goods? Isn't this really a contract issue between the U.S. trademark owner and the foreign manufacturer who is licensed to use the trademark?

The international gray market network is a sophisticated and secretive multi-billion dollar activity. Police affidavits and testimony from injured U.S. trademark owners confirm that trademarked products enter the gray market overseas as a result of broken distribution contracts, deceit, and even theft.

Gray market goods come to the United States via circuitous routes from all over the world. Indeed, the direct source of the gray market goods typically is a country other than the country of original manufacture or initial sale. In these circumstances, it is often difficult to trace the gray market merchandise back to their source.

Nonetheless, many U.S. trademark owners have spent millions of dollars overseas attempting to stop the importation of gray market goods. Their activities have included court proceedings to enforce exclusive licensing agreements, trademark infringement actions, the use of sophisticated technology, such as laser coding, to trace the origin of gray market goods, and, where possible, termination of distributors who sell into the gray market.

Such enforcement and detection efforts have had little effect, however. Many foreign countries, including Latin American countries and members of the European Community, severely limit the ability of trademark owners to enforce distribution agreements. Gray marketeers continue to frustrate tracing, and have developed the technology to eradicate laser codes.

In this regard, it may be useful to briefly recount the unsuccessful efforts of one U.S. company to combat gray market imports. Charles of the Ritz was a wholly-owned subsidiary of the Squibb Corporation engaged in the manufacture and sale of various fragrances and cosmetics. As a result of a multimillion dollar development and marketing effort, Charles of the Ritz's Yves Saint Laurent "Opium" fragrance ranked second in the U.S. perfume sales. As with any valuable trademark, "Opium" was the target of significant gray market activity.

Charles of the Ritz responded by spending millions of dollars on a laser coding system, hiring private investigators and implementing a computer tracking system. The company terminated its accounts of foreign distributors who sold to the gray marketeers, and it engaged in litigation both here and overseas to protect its trademark.

These herculean efforts by a single company were to no avail. Without a national policy prohibiting the importation of gray market goods, Charles of the Ritz could not -- at any price -- stem the massive flow of unauthorized gray market imports into the United States.

4. (Edley) It is my understanding allowing the importation of gray market goods increases the amount of illegal counterfeit goods which come into this country. Could you please explain this problem?

Although gray market goods are not counterfeit, gray market networks are increasingly being used for the distribu-

> "Second, the gray market provides a very useful defense for importers and retailers caught with counterfeit goods. When caught red-handed with counterfeits, the guilty party can claim, 'I didn't know these were counterfeits; I thought that they were gray market.'
>
> "Third, the gray market phenomenon itself, with its willy nilly pattern of importation, where there are no longer one, two or ten authorized importers but rather dozens of importers of a good, and in many cases importers that frequently change their company names, addresses, etc., has made it very difficult for law enforcement agents to distinguish between what is a counterfeit and what is a gray market good. And, given the very limited resources with which our law enforcement agents are able to fight commercial fraud, the Trojan Horse of the gray market in practice dramatically limits effective counterfeit enforcement."

Study prepared for COPIAT by T.M. Huhn Associates, Inc., June 19, 1989.

One additional aspect of the gray market should be emphasized in answer to this question -- the temptation that the gray market presents to importers to turn to counterfeit goods. The gray market is not a constant source or even a reliable source of goods. Frequently, gray market goods are sold by foreign distributors because they are old goods, damaged goods, or overstocks. When these goods are sold the distributor may have nothing more to sell into the gray market. This situation has tempted some gray marketeers to look to counterfeits to meet the continuing demand of their customers.

So long as products are allowed to be sold outside of authorized distribution channels without the consent of the U.S. trademark owner, the importation and sale of counterfeit and other illicit merchandise will flourish.

tion and sale of counterfeit merchandise. See, e.g., Staff of House Comm. on Energy and Commerce, 99th Cong., 1st Sess. at 1, 3-6 (Comm. Print 1985). Indeed, many counterfeits are made to look like gray market goods rather than authorized products. Often, the counterfeits and gray market goods are mixed together. In this way, counterfeiters are able to get their goods through Customs as gray market, and distributors and retailers can sell counterfeits with the excuse that they thought they were gray market, not counterfeit.

The police affidavit we have provided the Subcommittee states that the gray market "is an ideal front for product counterfeiting operations" and "a tremendous boon to product counterfeiters." See Affidavit of Richard D. Breuer and James T. Golden (June 9, 1987). More specifically, as these officers stated in sworn statements,

> "[T]his type of situation [gray market and counterfeit intermingling] is not uncommon. Because the gray market today is a lower risk activity, it is an ideal front for product counterfeiting operations. Foreign-made counterfeits that look like gray market goods are relatively easy to get into the country because Customs automatically lets most gray market goods in.
>
> "Moreover, whether foreign or domestic, counterfeits that look like and are mixed with gray market goods give distributors and retailers the excuse that they didn't know the products were counterfeit but simply believed that they came in through the unauthorized gray market. In our view there is just no question about it: the gray market is a tremendous boon to product counterfeiters, and it makes detection and apprehension of them and others in the distribution chain in many cases next to impossible."

(Emphasis supplied.)

Indeed, in a study completed last year for COPIAT by a former FBI agent and now a private investigator active in a large number of counterfeit busts, T.N. Huhn, the same counterfeiting and gray market linkage was confirmed. As Mr. Huhn has said:

> "And, I can report as a result of my efforts, I am convinced that there is clearly a very significant linkage between gray marketeering and counterfeiting."
>
> "This linkage appears to have developed for several reasons.
>
> "First, the gray market is a very useful disguise behind which counterfeit goods can hide. As noted below, frequently counterfeiters will bring in their goods along with a few gray market goods, and indeed will make their counterfeits to look like gray market goods. Mixed together in this fashion it becomes exceedingly difficult for law enforcement agents to spot counterfeit goods.

items as on U.S.-produced merchandise. Many developing countries have local content laws. Thus, for example, baby powder made in Brazil must include Brazilian talc which is different from U.S. talc.

In other countries local specifications differ from those in the United States. For example, cameras may be calibrated in meters rather than in feet; electronic products may operate only with foreign voltage requirements and may not operate to quite the same standard in the United States; and photographic and electronic components may not correspond or be adaptable to United States product lines. See Collado Associates, Inc., The Economic Impact of Diversion at Appendix 2 (September 1984).

In other instances, products may be formulated to meet local conditions and tastes. For example, the SUN LIGHT dishwashing detergent produced by Lever Brothers in the United Kingdom has been specially formulated for use in that country and does not work as well in the United States. See Lever Brothers Co. v. United States, 877 F.2d 111 (D.C. Cir. 1989). Similarly, Mercury Marine outboard motors are tailored to run on the fuels available in foreign markets.

In such circumstances, it would be pointless to require U.S. trademark owners to impose U.S. standards on merchandise which is produced abroad for sale overseas. The only impact of such an approach would be to further undermine the global competitiveness of U.S. corporations.

Answers to Senator Grassley's Supplemental Questions on S. 626, The Trademark Protection Act of 1989

3. (Edley) If this bill is intended to promote and protect the integrity of trademarks, why would a company owning a trademark sell the right to use their trademark to foreign companies who then may produce an "inferior product"?

In discussing the gray market, the term "inferior product" deserves careful scrutiny. I typically do not use this term when describing gray market goods, but rather, refer to them as less desirable for a U.S. consumer than the authorized product.

Gray market products are often the best products available for the country where they are *intended* to be sold. However, they are produced to comply with foreign conditions, foreign legal requirements (such as local content requirements) and foreign tastes. For example, products like gray market detergent have been specially formulated to perform under foreign water conditions and may not work as well in the United States. *See* *Lever Brothers Co.* v. *United States*, 877 F.2d 111 (D.C. Cir. 1989).

Similarly, United States companies have invested significant sums to develop outboard motors tailored to specific world markets. This includes a host of internal adjustments so that motors sold in a particular market can accommodate the fuels available in that market. Some of the differences are quite significant since certain motors designed for use overseas may stall or even catch on fire when improperly filled with U.S. fuel. Both types of incidents have, in fact, occurred.

Even where gray market goods and U.S. trademarked products are physically identical at the time of manufacture, gray market merchandise may be less desirable by the time that it reaches U.S. consumers as a result of lower shipment and handling standards and deterioration in route. As a result batteries may have a shortened life, the flavor of beverages may deteriorate due to improper temperature controls during transit, and detergent may be ruined by excessive moisture from packaging inadequate for overseas transshipment. *See, e.g.*, *Certain Alkaline Batteries*, Inv. No. 337-TA-165, *USITC Pub.* 1616 (1984). Of course, neither U.S. trademark owners or foreign manufacturers exercise any control over the way that merchandise is handled in transit by gray marketeers.

4. (Edley) Could U.S. trademark owners stipulate in any contracts they form with foreign users of their trademark, that the products bearing their trademark adhere to certain standards?

Because of foreign laws and regulations, foreign tastes and environmental conditions, U.S. trademark owners are often unable to impose the same standards on foreign trademarked

QUESTIONS FROM SENATOR DeCONCINI

Questions For Panel I
Gray Market Hearing
April 4, 1990

5. (Boardman) In some situations the U.S. trademark owner does not manufacture the goods in the U.S. but only acts as the authorized U.S. distributor. In this situation, how are U.S. workers harmed by parallel imports since there are no U.S. manufacturing facilities affected?

As discussed in detail in my written statement, gray market imports adversely affect a wide range of American industries, U.S. manufacturing industries that sell in this country only that which they produce here. Soft drinks; household goods; baby products; glass container products; auto parts; outboard marine engines; and batteries -- these are but a few examples of the American-manufactured products that are being displaced by the sale of gray market goods.

U.S. industries hurt by the gray market also include non-manufacturing concerns such as authorized importers and distributors. These companies utilize significant numbers of United States workers in marketing and servicing their products. For example, the U.S. watch industry employs thousands of people in these capacities. These American workers depend for their livelihoods on the ability of their companies to maintain the value of their trademark goodwill and to recover the costs associated with the development of that goodwill.

In contrast, the gray market does not invest in American labor. Indeed, it is precisely the avoidance of the labor and other costs incurred by United States trademark owners and their authorized distributors in creating valuable trademarks that allow the gray marketeers to turn a profit. Unlike the authorized products that are displaced by the gray market sales, gray market goods are not manufactured, promoted, or serviced in this country in any meaningful way.

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April 30, 1990

Cecilia Swensen
Committee on the Judiciary
Hart Senate Office Building
Room 327
Washington, D.C. 20510

Dear Ms. Swensen,

Please find enclosed the responses to the questions from hearing on gray market goods, April 4, 1990 before the Subcommittee on Patents, Copyrights and Trademarks.

Sincerely,

John A. Boardman
Director

Vice Presidents
SAM H. SENSLER
JACK CAFFEY
FRANK W. CARTER
E. L. (VERA) CATELLI
JOHN DECONCINI
FRANK HANLEY
EDWARD T. HANLEY
LARRY R. JACKSON
MARION A. LEE
LENORE MILLER
JOSEPH M. MISBRENER
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JOHN J. SWEENEY
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CAROL TUCKER FOREMAN
NIKKI HEIDEPRIEM

April 30, 1990

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
327 Hart Senate Office Building
Washington, DC 20510-6275

Dear Senator DeConcini:

Enclosed please find the answers to the supplemental questions you forwarded to me. I appreciated the opportunity to testify on S. 626.

Sincerely,

Carol Tucker Foreman

Carol Tucker Foreman

QUESTIONS FROM SENATOR CHARLES E. GRASSLEY

1. (Boardman) If imported goods violate United States Law (such as health or safety standards), aside from gray market issue, is it already illegal to import such goods into our country?

Although gray market goods frequently pose potential health or safety concerns, there are often no laws that would prevent the importation of such gray market products. For example, gray market toothpaste sometimes contains dangerously high flouride levels. The highly-flouridated toothpaste is produced and sold in Latin America and elsewhere in the Third World, where water is not flouridated. The same product is potentially harmful to U.S. consumers whose water supply is already flouridated. Similarly, outboard motors may be tailored to accommodate the fuels available in foreign markets and may stall or catch fire when improperly filled with U.S. fuel.

Moreover, once goods have passed through Customs and been dispersed throughout the United States enforcement efforts are very difficult. Thus, while the FDA has seized numerous gray market goods, other potentially harmful merchandise has reached U.S. consumers. See FDA Reports, Toiletries, Fragrances and Skin Care 7 (Oct. 22, 1984) (FDA seizes 50,000 units of Oil of Olay containing Red Dye No. 2). The most effective place to deal with such potential problems is at the one point where gray market goods are gathered together -- U.S. Customs.

2. (Boardman) Should legitimate, non-counterfeit, so-called gray market products, which pose no risk to consumers, be banned from importation?

Gray market goods should be eliminated from the U.S. market place. Gray market good not only expose consumers to potential health and safety problems but, by there very nature, deceive American consumers. Consumers who purchase trademark items do so because of the ability to rely on the trademark as representative of a certain level of quality and service. By holding themselves out as equal to the authorized U.S. trademarked products, gray market goods deceive consumers into believing that they will receive the same level of quality and service.

Further, gray market goods deny American workers the opportunity to compete fairly. Consumer reliance on a trademark is not accomplished without effort. American workers and their companies incur sacrifice and expense in the development of a trademark. A gray market importer has incurred no expense and, in essence, gets a free ride on the contributions made by American workers and their companies. A market that accommodates true competition should not allow one party such a tremendous, unfair advantage over the other. Denial of entry to gray market goods would stop consumer deception and the resulting trademark erosion and allow American workers and their companies to compete on level playing field.

Answers to Chairman DeConcini's Supplemental Questions on S. 626, The Trademark Protection Act of 1989

6. (Ms. Foreman) Please explain how demarking a gray market good would better inform and protect the consumer and why it is a better solution than merely requiring the goods be labelled as gray market?

Demarking is preferable to labelling for three reasons. Demarking is the easiest and simplest way for consumers to identify gray market products. It is also the easiest and simplest way for government to enforce a law requiring the identification of gray market goods. Finally, demarking virtually assures gray market goods will be offered at the lower price gray market advocates promise.

Consumers use trademarks to identify a product they know and like and want to buy. Using the trademark saves time. You don't have to study the small print, you just grab the trademarked product, assuming it will be identical to the one you bought before and want to use again. If the trademark is removed, the consumer can't be mislead.

Some supporters of the gray market argue that consumer deception would end if the United States were to adopt a national labelling law similar to that in force in New York State. It should be observed, however, that the New York law is very limited in scope. It only requires disclosure where gray market goods are ineligible for manufacturer's warranties or rebates or lack English-language instructions. Importantly, the law does not require gray marketeers to disclose physical differences between their products and authorized trademarked merchandise. Thus, despite the fact the law was enacted in 1985, U.S. trademark owners continue to receive complaints from New York consumers who have mistakenly purchased gray market goods.

An effective labelling law would require gray marketeers to (i) prominently disclose all physical differences between the authorized merchandise and gray market goods, and (ii) clearly explain the significance of these differences. It is doubtful that, as a practical matter, such disclosure is possible in many gray market contexts. To illustrate this point, it is useful to consider the case of the Mercury Marine Division of the Brunswick Corporation which has invested significant sums to develop outboard motors tailored to specific world markets. This includes a host of internal adjustments so that motors sold in a particular market can accommodate the fuels available in that market. These specification differences easily fill a single-spaced page of text. Some of the differences are quite significant since certain motors designed for use overseas may stall or even catch on fire when improperly filled with U.S. fuel.

It is difficult to imagine a labelling program that would adequately disclose all of the myriad differences between authorized and gray market Mercury motors. Moreover, such a program would be very expensive and difficult to enforcement.

It could easily occupy a substantial number of government and private lawyers without ever providing consumers with what they need to make a rational decision.

Finally, advocates of gray market maintain that gray market imports keep prices down. We know that retailers get gray market goods at a lower price, but there is no proof they sell them at a lower price. In this regard, we have often found gray market goods mixed with legitimate products and offered at the same price. If the trademark is removed, the retailer will almost surely be forced to offer the item at a lower price because it is clearly not the same thing as the trademarked item.

7. (Ms. Foreman) The gray marketeers claim consumers will pay substantially higher prices if gray market goods are eliminated. Is this true?

Demarking would not prevent the importation of any products whatsoever as long as importers are willing to remove or cover U.S. trademarks. This is not an illusory option. Many companies, such as clothing discounters like Loehmann's and Sym's and department stores like Sears, sell goods made by a U.S. trademark owner or an affiliate of a U.S. trademark owner under their own brand name or as generic items. In fact, Sears is currently running a television commercial which claims that over half the homes in America contain Sears house-brand appliances.

These are not isolated examples, but rather, evidence of a widespread practice affecting all types of merchandise throughout the United States. As discussed in my previous answer, demarking will create pressure to lower the prices of gray market goods because demarking will end consumer deception. Realizing that the product is different from the legitimate trademarked product, consumers will expect it to be sold for less.

Answers to Senator Grassley's Supplemental Questions on S. 626, The Trademark Protection Act of 1989

1. (Ms. Foreman) If imported goods violate United States Law (such as health or safety standards), aside from any gray market issue, is it already illegal to import such goods into our country?

Although it is illegal to import products which violate U.S. health standards, once goods have passed through Customs and been dispersed throughout the United States enforcement efforts are very difficult. Thus, while the FDA has seized numerous gray market goods, other potentially harmful merchandise has reached U.S. consumers. See FDA Reports, Toiletries, Fragrances and Skin Care 7 (Oct. 22, 1984) (FDA seizes 50,000 units of Oil of Olay containing Red Dye No. 2). The most effective place to deal with such potential problems is at the one point where gray market goods are gathered together -- U.S. Customs.

Moreover, some products may be unhealthful while not violating health standards. For example, toothpaste intended for sale in countries where water is not fluoridated have more fluoride than those made for sale in the U.S. where water is fluoridated. The toothpaste does not violate any federal standard but might be hazardous if used in conjunction with fluoridated water. Another example is the use of different, but safe ingredients, which may cause an unexpected allergic reaction in unsuspecting users. A consumer may have used a trademarked product safely for many years, then purchase a gray market version of it and suffer a reaction to a substance that is not used in the domestic version, but is included in the product made for sale abroad.

Even where they pose no obvious health hazards, virtually all gray market products are different than those to be sold in the United States. The difference may be small (e.g., the absence of deodorant in a soap one expects to have deodorant), but the consumer did not get what he or she rightfully expected from the trademarked product. Both the trademark owner and the consumer suffer from the deception.

2. (Ms. Foreman) Should legitimate, non-counterfeit, so-called gray market products, which pose no risk to consumers, be banned from importation?

S. 626 does not propose to ban gray market products. It would simply require that the trademark be removed from them. Demarking is a reasonable compromise between those who would prefer to ban importation of gray market goods and those who want them to be offered for sale without restriction.

U.S. trademark owners contend that the gray market is the result of free-riding and consumer deception. Gray marketeers argue that trademark owners simply are trying to prevent discount pricing. Product demarking is the perfect compromise, in that it takes each side at its word and forces it to live with its respective position.

Under a demarking compromise, gray marketeers would be free to import and sell products in any manner and at whatever prices they choose so long as they first demark the product. This would frustrate any attempts by trademark owners to control prices through an embargo. At the same time, it would require gray marketeers to make their sales on the basis of their own promotional and marketing investments and post-sale services, and not those of U.S. trademark owners. It also would permit consumers to make fully educated buying decisions.

Demarking also has the benefit of being feasible and simple to administer: (i) most products can be demarked for pennies per item; and (ii) implementation by the government could be accomplished at a handful of major ports, and would require little more Customs involvement than at present, since all unauthorized trademarked goods must be inspected for counterfeits anyway.

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April 30, 1990

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator DeConcini:

Christopher C. DeMuth requested that we submit his answers to the supplemental questions that he received from the Committee concerning S. 626, the Trademark Protection Act of 1989. His answers are enclosed accordingly.

Sincerely yours,

D R Grace

Eugene A. Ludwig
Scott D. Gilbert
David R. Grace

Enclosures

Answers to Chairman DeConcini's Supplemental Questions on S. 626, The Trademark Protection Act of 1989

8. (DeMuth) If S. 626 is enacted and gray market goods are no longer allowed to be imported into the U.S. unless they are demarked, how will this affect the U.S. economy?

S. 626 would improve the efficiency of the U.S. economy and provide consumers with more and better information and a wider array of choices in making consumer purchases -- without compromising legitimate and beneficial price competition.

Under S. 626, gray market importers would no longer be able to free ride on the investments of U.S. trademark owners and their authorized distributors. As a result, trademark owners and authorized distributors would have greater incentives to make marketing, distribution, and servicing/ quality control investments -- investments which keep consumers informed of the attributes of different products, intensify interbrand price and quality competition, and make entry of new brands easier.

S. 626 would not prevent the importation of any products whatsoever as long as importers are willing to remove or cover U.S. trademarks. Many companies, such as Sears & Roebuck, sell goods made by a U.S. trademark owner or an affiliate of a U.S. trademark owner under their own brand name or as generic items. Similarly, clothing discounters such as Loehmann's and Sym's effectively market brand name clothing with labels removed. These are not isolated examples, but rather evidence of a widespread practice affecting all types of merchandise throughout the United States. Based upon my examination of the economic data developed on the gray market, it is my belief that following the institution of a federal demarking program, "house brand" and "generic" products would continue to compete with branded items and, along with other forms of interbrand competition, would help maintain a competitive pricing environment.

In addition, demarking would serve two useful information functions. First, it would remove misinformation about the origin of gray market products. Second, it would put consumers on notice that they should investigate the product in question before the make a purchase.

Demarking would oblige gray market importers to undertake some U.S. marketing and distribution efforts of their own, thereby diminishing the problems of free riding and inferior products. And, because gray marketeers would have a direct stake in the reputation of their demarked products, they would have an incentive for monitoring the quality of their merchandise.

9. (DeMuth) What affect does the U.S. exchange rate have on the gray market?

As explained in detail in my research paper, "The Economics of Gray Market Imports," international currency fluctuations affect the flow of gray market imports by increasing the value of marketing expenditures in nations with relatively "strong" currencies as measured in foreign currencies. One would expect, therefore, free riding gray market imports to increase with the relative appreciation of a nation's currency. This appears to be the case, and is important evidence that free riding rather than international price discrimination is the cause of gray market importation. The appreciation of a nation's currency should have no systematic effect on the opportunities for price discrimination against that nation -- on the market power of foreign producers or on the elasticity of demand for their products.

10. (DeMuth) Could you please explain how this bill is not price-fixing as some of the opponents have suggested?

The enforcement of property rights -- in the case of S. 626, trademark rights -- has nothing to do with price fixing, and enactment of S. 626 would have no effect on opportunities or incentives for price fixing in the United States or elsewhere.

Gray market importers often suggest that discounted goods are synonymous with gray market goods. This is incorrect. Manufacturers and authorized distributors typically sell to a wide variety of retailers, e.g., discount houses, catalogue merchandisers, and department stores. For example, K mart, one of the major discount chains, sells numerous authorized products; a K mart official recently stated that less than one percent of the company's merchandise comes from the gray market. And gray market products frequently sell at the same price as authorized products. For example, gray market batteries often sell at the manufacturer's suggested retail price. See Certain Alkaline Batteries, Inv. No. 337-TA-165, USITC Pub. 1616 (1984). Moreover, many gray market goods, such as soap, baby shampoo and other personal care items, are frequently sold in the same bins with authorized merchandise.

Some product manufacturers do prefer to market their products in stores offering full services, pleasing displays and other amenities. But even in this context, manufacturers cannot control resale prices. Even these items are frequently sold at discount or promotional prices and indeed often sell for less than gray market imports. For example, in 1984, Charles of the Ritz Group conducted a random survey of 124 stores throughout the country selling their fragrances on the gray market and found that 62 percent were selling the gray market merchandise at or above the company's suggested retail prices.

The issue of enforcement of intellectual property rights in the context of the gray market is different from the issue that arose in the 1960's with respect to the "fair trade laws." Those laws were designed to permit a manufacturer to enforce the price at which its goods could be sold at retail. The enforcement of intellectual property laws provides important economic benefits to consumers regardless of whether "retail price maintenance" is permitted or prohibited.

11. (DeMuth) In your testimony, you propose that demarking the gray market product may eliminate free riding on the trademark's reputation and free riding on the marketing investments made by the authorized brand distributors. How do you respond to the argument that demarking deprives the importer of value originally incorporated into the purchase of the trademark rights?

Today, parties who purchase goods abroad may only import them into the United States if the goods comply with the applicable laws and regulations. For example, if quotas apply or if goods violate FDA labelling requirements, they may not legally enter the United States. To the extent foreign purchasers intend to resell foreign merchandise in the United States, they take U.S. laws into account when deciding whether to make a purchase and how much to pay for a particular item.

Should the United States decide to enforce U.S. trademark laws through a demarking program, the situation would be no different. In this regard, it should be observed that U.S. courts have long recognized that trademarks are territorial in nature. See A. Bourjois & Co. v. Katzel, 260 U.S. 689 (1923). Under this principle, the same symbol is a different trademark in each country where goods bearing the symbol are sold. When a foreign manufacturer places a symbol on goods intended to be sold abroad, those goods are not marked with a U.S. trademark but rather with a foreign mark. A foreign purchaser of those goods has no right to the goodwill associated with the mark in the United States; he is only purchasing an article with a foreign mark that is intended for sale abroad. If the goods later are imported with the U.S. trademark owner's consent, then the symbol is adopted and becomes the U.S. trademark. However, if the U.S. trademark owner does not consent to the importation, the foreign mark merely masquerades as the U.S. mark and infringes the rights of the U.S. mark owner.

The U.S. Customs Service already prohibits the entry of certain gray market goods (i.e., those produced abroad by parties unrelated to the U.S. mark owner). To the extent that possible U.S. resales are important to foreign buyers, the Customs Service policy will be reflected in the prices that they pay. In other words, the prices for the gray market goods will be discounted to reflect the fact that they cannot be imported into the United States absent demarking. Importers who purchase products at these discounted prices are not injured when the Customs Service follows its stated policy and excludes them from entry.

Under S. 626, this principle would be extended to all gray market merchandise. Foreign purchasers would not be injured because the U.S. exclusion policy would be reflected in foreign prices.

Senator DeConcini. Our next panel, the last panel of witnesses, will be Mr. Robert Stevenson, vice president, public affairs, K mart Corp.; Mr. Mark Silbergeld, director, Washington office, of the Consumers Union; and Prof. William S. Comanor, economic consultant.

Gentlemen, thank you for being with us today, your full statements will be appear in the record, and we ask that you cover them in 5 minutes for us.

Let's start with you, Mr. Stevenson.

STATEMENT OF A. ROBERT STEVENSON, VICE PRESIDENT, PUBLIC AFFAIRS, K MART CORP., TROY, MI

Mr. Stevenson. Thank you very much, Mr. Chairman.

My name is A. Robert Stevenson. I am vice president of public affairs for the K mart Corp. I've been with the company for 25 years. I am testifying today on behalf of the International Mass Retail Association, or the IMRA, which represents price competitive discount stores—35,000 stores in 50 States with $130 billion in sales. K mart itself has over 2,200 discount stores, and it is a corporation that has $30 billion in sales.

Today I'd like to cover three points, the benefits to competition with the current practice, the benefits to consumers with the current practice, and reasons why S. 626 should not be enacted.

As to the first point, the benefits to competition, parallel imports as you've mentioned, are trademark merchandise manufactured overseas and promoted worldwide and they fall into certain categories, of cameras, watches, and perfumes. They are not counterfeit items, but they are merchandise that are sold at a lower price on the world market than the price in the United States. For 50 years, the Customs Service has allowed the importation of these items, and public policy has reenforced that position. This is lawful activity that promotes retail competition, and America should not be the island for higher prices.

Dual distribution, based on open competition without manufacturer dictated monopoly should be allowed to continue as to the benefits to consumers. This allows for a greater selection of merchandise and lower prices. Example, a Seiko watch. It has a suggested retail price of a $195. We sell it in K mart for $100 or $120. A Citizens watch, which has a suggested retail price $110, we sell for $50 to $60, and the average savings is up to 40 percent, wherever possible on these type items.

In 1984, Market Progue International, had an opinion survey, they surveyed some 602 customers in six cities, on four categories, cameras, watches, perfumes, and tires, and by a margin better than 2 to 1 the response has been the customers prefer the lower price with a distributor or retailer warranty than with a manufacturers warranty. So, we feel it is an accepted product that can be distributed on a legitimate basis.

The third point I'd like to make is why S. 626 should not be enacted. It's not necessary for the protection of legitimate trademark interests. The trademark's origin is a stamp of the craftsman saying that this is a genuine product. We're not talking about copies here. All these products come from basically the same plants. We're not talking about low quality or hazardous items, or the public would not buy them.

Further, if hazardous products are involved, there are laws on the books in terms of what can be sold in the United States. As to the potential for fraud, consumer deception, we don't feel that there is a case that can be made that could warrant S. 626. There are laws on the books on fraud and deceit.

Finally the manufacturers can prevent deception by simply making statements on the packaging as to the origin of the products or differentiating the products if they so choose. In parallel imports, the questions of warranties come up, and if a manufacturer wants to exclude U.S. warranty on certain products, they should disclose that. We at K mart provide warranties for the products we sell. We're happy to give the customer their money back if they're not happy, and we feel that it's a legitimate bargain for the consumer. Also, we are subject to the Magnasun laws and other consumer laws on warranty protection.

We feel that S. 626 should be rejected, and that current law and customs should prevail, and there's a definite savings to consumers. It does stimulate competition, and it preserves a market economy, and it prevents the unjust enrichment of foreign brand manufacturers at the expense of needy Americans.

Just as a final comment, we would like to file for the record statements of the Coalition for Competitive Imports and the International Mass Retail Association and the American Free Trade Association, and also the Association of Catalog Showroom Merchandisers at this time. Thank you very much.

Senator DeConcini. It will be included in the record.

[Material supplied for the record follows:]

TESTIMONY

OF THE

INTERNATIONAL MASS RETAIL ASSOCIATION

TO THE

SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS

COMMITTEE ON THE JUDICIARY

U.S. SENATE

ON S. 626

PRESENTED BY: A. ROBERT STEVENSON
VICE PRESIDENT
PUBLIC AFFAIRS
K MART CORPORATION

APRIL 4, 1990

SUMMARY OF MAIN POINTS IN TESTIMONY

1. Parallel imports are genuine goods, bearing trademarks which correctly identify their maker.

2. Parallel importation is a wholly legitimate trade practice, long authorized by U.S. Customs practice and regulations, and lawful under U.S. trademark and antitrust laws.

3. A market for parallel imports is created when manufacturers attempt to charge U.S. consumers substantially more than they charge in other countries for the same or very similar genuine products.

4. Some manufacturers refuse to deal with distributors who offer competitive prices or refuse to adhere to artificially high suggested prices. For such price-competitive distributors, parallel imports may be the only available supply source.

5. Parallel imports bring consumers a greater selection, and better prices (often with savings of up to 40%) on many brand name goods. If parallel imports are not available, U.S. consumers will pay substantially higher prices.

6. By more than 2 to 1, U.S. consumers would prefer to pay lower prices and receive a warranty from a distributor or retailer, rather than pay higher prices and receive the manufacturer's warranty. Parallel imports make that consumer choice possible.

7. S. 626 is not necessary to protect legitimate interests of U.S. trademark owners. Remedies for infringement are easily obtainable under existing trademark law.

8. The proposed legislation is a classic example of overkill. The evils ascribed to parallel imports are largely exaggerated and misstated, and could be easily cured by the proponents of this legislation if they wished to effectuate such cures.

TESTIMONY

OF THE

INTERNATIONAL MASS RETAIL ASSOCIATION

TO THE

SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS

COMMITTEE ON THE JUDICIARY

U.S. SENATE

ON S. 626

PRESENTED BY: A. ROBERT STEVENSON
VICE PRESIDENT
PUBLIC AFFAIRS
K MART CORPORATION

APRIL 4, 1990

My name is A. Robert Stevenson. I am Vice President for Public Affairs at K mart Corporation. I am here on behalf of K mart Corporation and the International Mass Retail Association to discuss the impact of S. 626 on consumers who patronize retail chain stores and on competition in general.

K mart is a mass merchandiser and retailer which operates over 2,000 "discount" department stores, where consumers can purchase brand name and private label merchandise at substantial savings. In order to offer low prices to consumers, K mart has, from time to time, made purchases of foreign-manufactured goods legitimately produced and properly bearing trademarks registered in the United States.

The International Mass Retail Association ("IMRA"), represents over 140 discount retail chains which have well over 35,000 stores, operate in every state of the nation, account for over $130 billion in annual sales and employ more than one million Americans.

The parallel imports purchased by IMRA members in the past have included, among other products, cameras and accessories, watches, fragrances, tires and crystal glass. Such purchases involve millions of dollars at retail.

Consumers have shown that they want and need the opportunity to purchase quality merchandise at fair reduced prices; they expect their legislators to preserve and protect this right.

It is K mart's and other consumer-oriented retailers' policy to offer American consumers the highest quality brand name and private label merchandise at the lowest possible price. But implementing this policy is not easy. For various reasons, which often amount to thinly veiled attempts at price-fixing, many manufacturers refuse to deal directly with us. They may couch their refusals in code words, such as a desire to foster a higher-quality image, when what they mean to say is that they want to maintain artificially high retail prices. Discount retailers and mass merchandisers, such as K mart and other member stores of IMRA, are often forced to seek alternative sources of supply for merchandise with a high level of consumer appeal.

Background of S. 626

One important source of merchandise for American retailers is parallel imports (sometimes mistakenly referred to as gray market goods). The terms "parallel imports" and "gray market" merchandise refer to trademarked, name brand merchandise manufactured overseas by foreign owners or trademark licensees who promote the trademark worldwide. More often than not, the owners of the trademarks are foreign-based manufacturers of cameras, watches, fragrances, and similar specialty merchandise bearing brand names which have been registered for U.S. use by subsidiaries or other controlled affiliates of the foreign parent.

Parallel imports are genuine (not copied) merchandise that the trademark owner has made to his own specifications. They are goods that the trademark owner initially sells overseas in foreign markets, at a much lower first-cost price than he sells the same item to retailers or distributors in the United States. This price discrimination is the economic cause for "parallel" importation by independent distributors located in the United States. If the multinational corporations which originally produced these genuine trademarked goods did not charge discriminatorily high prices to American purchasers, there would be no incentive for parallel importation.

Parallel imports benefit the American consumer as well as competition in the marketplace.

The Effect of S. 626

S. 626 will have the effect of enacting a sweeping government-endorsed embargo of all parallel imports. Products which have been freely purchased by American retailers, and which are regularly distributed at discount prices to American consumers, will be precluded from normal competitive channels within the United States. The effect will be to create a government-endorsed monopoly for foreign manufacturers who desire to control the resale pricing of their own goods in the United States market. A similar effect will occur in the case of those American based manufacturers who have their trademarked product manufactured (by cheaper labor) overseas.

Clearly, one economic effect of the proposed legislation is to impose higher prices and to foreclose product selection by American consumers. Another economic effect will be to adversely affect the business of American retailers throughout the United States who have come to depend upon genuine trademarked parallel imports as a source of supply for their consumer trade. The beneficial effects of the import price competition which these discounters, catalog showrooms and other price conscious retailers have infused into the U.S. market will be destroyed.

Regrettably, the proposed Trademark Protection Act of 1989 reverses and wipes out the trademark law as it has been long known and enforced under the terms of Section 42 of the Lanham Act[1/] and Section 526 of the Tariff Act of 1930.[2/] For better

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[1/] Section 42 of the Lanham Act, 15 U.S.C. § 1124, provides in pertinent part:

> [N]o article of imported merchandise which shall copy or simulate the name of the [sic] any domestic manufacture [sic], or manufacturer, or trader, or of any manufacturer or trader located in any foreign country...or which shall copy or simulate a trademark registered in accordance with the provisions of this chapter...shall be admitted to entry at any customhouse of the United States...

[2/] Section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526, provides, in pertinent part:

> Importation prohibited
>
> (a) Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or

(footnote continued)

than 50 years, the Customs Service regulations have permitted parallel imports under Section 526 of the Tariff Act and Section 42 of the Lanham Act.[3]

The meaning of the existing law, and the extent to which trademark owners can seek to preclude importation of goods manufactured overseas, has been a subject of extensive debates in the courts. Those courts have repeatedly ruled that corporations manufacturing overseas cannot restrict the U.S. market by precluding the importation of genuine parallel imports.

(footnote continued from previous page)

> association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of Title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said Title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

[3] Under 19 C.F.R. § 133.21, the ban on importing foreign manufactured goods bearing a United States trademark does not apply when:

> (1) Both the foreign and the U.S. trademark or trade name are owned by the same person or business entity; [or]
>
> (2) The foreign and domestic trademark or trade name owners or parent and subsidiary companies are otherwise subject to common ownership or control (see §§ 133.2(d) and 133.12(d); [or]
>
> (3) The articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U.S. owner . . . .

These same regulations have been sustained as valid under Section 42 of the Lanham Act. Weil Ceramics and Glass, Inc. v. Dash, 878 F.2d 659 (3d Cir.), cert. denied, 110 S. Ct. 156 (1989); NEC Electronics, Inc. v. CAL Circuit Abco, Inc., 810 F.2d 1506 (9th Cir.), cert. denied, 484 U.S. 851 (1987); Olympus Corp. v. United States, 792 F.2d 315 (2d Cir. 1986), cert. denied, 486 U.S. 1042 (1988); Yamaha Corporation of America v. United States, No. 89-1431 (HHG) (D.D.C. January 11, 1990). Title 15 U.S.C. § 1124, Section 42 of the Lanham Act, prohibits the importation only of goods "which shall copy or simulate" the name of any "domestic . . . manufacturer or trader, or of any manufacturer or trader located in any foreign country, which, by treaty, convention, or law affords similar privileges to the citizens of the United States. . . ." (Emphasis added). Since parallel imports are genuine goods, the courts have been almost uniform in their rulings that the Lanham Act does not preclude the importation of such goods.

As Justice Scalia said in K mart, "§ 42 of the Lanham Trademark Act . . . prohibits importation of goods of foreign or domestic manfacture bearing not genuine trademarks identical to a U.S. trademark, but trademarks that 'copy or simulate' a recorded trademark." 486 U.S. at 320 n. 1.

S. 626 destroys that familiar and customary interpretation of the trademark law. S. 626 greatly enhances the right of manufacturers to control resale prices and competition among American retailers at the expense of the American consumer.

In K mart Corporation v. Cartier, Inc., et al., 486 U.S. 281 (1988), Justice Kennedy, writing for the majority, found that the so called common control provisions of 19 C.F.R. § 133.21 were reasonable interpretations of Section 526 and were a proper exercise of agency enforcement discretion. While the Supreme Court decision in K mart v. Cartier interpreted only Section 526, four justices, joining in an opinion written by Justice Brennan, strongly supported the validity of parallel imports under established U.S. trademark law principles. As Justice Brennan stated:

> Section 526 of the Tariff Act of 1930 (1930 Tariff Act), 46 Stat. 741, as amended, 19 U.S.C. § 1526, provides extraordinary protection to certain holders of trademarks registered in the United States. A U.S. trademark holder covered by § 526 can prohibit or condition all importation of merchandise bearing its trademark, thereby gaining a virtual monopoly, free from intrabrand competition, on domestic distribution of any merchandise bearing the trademark. For half a century the Secretary of the Treasury has consistently interpreted § 526 to grant this exclusionary power not to all U.S. trademark holders, but only to certain ones with specifically defined relationships to the manufacturer. Specifically, Treasury has a longstanding practice, expressed currently in 19 CFR § 133.21 (1987) (Customs Service regulation), of not extending § 526's extraordinary protection to the very firm that manufactured the gray-market merchandise abroad, to affiliates of foreign manufacturers, or to firms that authorize the use of their trademarks abroad. Consequently, a multibillion dollar industry has emerged around the parallel importation of foreign-manufactured merchandise bearing U.S. trademarks.

486 U.S. at 295.

Benefits To Consumers In Parallel Imports

The American consumer is entitled to the same good deal on branded merchandise that is available to other consumers around the world. Continued freedom of parallel imports gives that good deal to American citizens.

But, in many cases, the trademark owner, whether located in Japan or somewhere else overseas, does not "intend" the branded goods to be sold in the United States at discounted prices. They are instead predestined for and shipped to some other market (Europe, for example), often at a much lower first-cost price than the very same merchandise is sold in the United States.

There is no reason why British, French, or German consumers should pay less than Americans for branded cameras, watches, fragrances, and tires, to name a few of the more significant items which retail chain stores may purchase through "parallel" or "dual" distribution channels.

Price, the quintessential mechanism of a market economy, is the most obvious reason for independent distributors to import merchandise on a parallel basis. Importation of merchandise enables K mart and the other member stores of IMRA to distribute at least some branded merchandise to millions of Americans at a fair price (sometimes as much as 40% off the manufacturer's suggested retail price).

Let me give you some examples of K mart's retail prices for parallel imports. A Seiko watch retailing for $195 at an "authorized dealer" supplied by Seiko's United States trademark licensee would cost a K mart shopper only $100-$120 when imported through parallel channels. A Citizen brand watch with a suggested retail price of $110 would be sold by K mart at $50-$60 as a parallel import.

American consumers vote with their dollars as well as at the ballot box. If the consumers did not want parallel imports, there would be no reason for the vast aggregation of foreign interests that seek to prevent such importation. Similarly, if such products were hazardous or otherwise unacceptable, it is clear that Americans would not accept them.

In September 1984, Market Probe International, a private survey company in New York, conducted a consumer opinion survey related to parallel import distribution of four product categories (cameras, wrist watches, fine perfumes, and quality automobile tires).[4/]

A total of 602 consumers were interviewed with a stratified sampling that spread age, income, sex, family and employment status, education, and ethnic characteristics over a systematically distributed pattern. The consumers were interviewed in the six important retail markets of Atlanta, Boston, Chicago, Houston, Los Angeles and Phoenix.

Consumers were largely indifferent as to whether the item was imported by the trademark owner or by an independent distributor, or was produced within the United States. Origin-Distribution was the least important factor in consumers' purchasing decisions in the sample survey.

[4/] This survey has been made available to the staff of this Subcommittee.

Many consumers recognized the importance of the manufacturer's warranty. They understood that if they purchased a parallel import, they might not receive such a warranty in some cases. But, overall, 79% of the surveyed consumers wanted to receive the best value for their money, and 67% of them perceived the best value to be a price-discounted "parallel" import with a third party's written warranty, not the manufacturer's. In other words, by a margin of better than 2 to 1, consumers would clearly prefer to pay a lower price for an item and receive a product warranty from a distributor or retailer rather than pay a high retail price and receive a manufacturer's warranty.

This consumer opinion survey is confirmed by substantial consumer buying patterns. The annual volume of parallel imports has been estimated by Fortune Magazine (January 7, 1985, page 89) to be $6 billion.

Benefits To Competition In Parallel Imports

In practical terms, if several leading manufacturers tend to dominate a successful branded goods industry and have similar price lists, or want to impose retail price maintenance upon retailers, parallel importation of that merchandise offers the only real competitive window to help keep prices down. It also keeps some brands on our shelves for the public. But even if there may be vigorous competition at the producer level, we find prices of branded merchandise in foreign markets are often substantially lower than those inside the United States market, even with today's weaker dollar foreign exchange rates.

I have spoken of price, and its importance cannot be understated. But a further competitive reason underpins the importance of parallel imports of branded merchandise: It is the fact that many manufacturers of name brand merchandise refuse to deal with, or sell to discount retailers. They decide to restrict their distribution of certain branded merchandise to dealers who agree to comply with the manufacturer's "list" or suggested retail prices. These refusals to deal prop up high, fixed retail prices. This phenomenon is the incarnate vestige of the old "fair trade" price fixing theories of the 1930's. That practice lasted through the 1950's when it waned in popularity and then was overwhelmingly repealed by Congress in the mid-1970's.[5]

For nearly fifty years under Customs Service policy and regulations, independent importation of merchandise on a basis "parallel" to imports by U.S. subsidiaries, licensees, "authorized" distributors, or trademark owners themselves, has been freely allowed. The practice of "parallel importation" has been, and is today a fully lawful, proper, and ethical practice which promotes retail competition. Such parallel imports are completely lawful under all trademark and antitrust laws in the United States.

Dual distribution in a market economy is based on open competition rather than some artificial structuring such as manufacturer-dictated division of, and monopoly of, markets.

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[5] See e.g. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

The general benefits to the consumer and to competition are obvious: A greater selection of branded merchandise, at lower prices.

Legitimate Trademark Protection Does Not Require The Passage of S. 626

K mart, like many retailers, is a trademark owner. It diligently protects and enforces its trademarks throughout the world. Remedies for infringement are easily obtainable under existing trademark law.

But legitimate trademark protection does not require the passage of S. 626.

Parallel import cases do not present the issues that normally arise in a Lanham Act trademark or unfair competition case. The typical Lanham Act case arises when a trademark owner seeks to stop the manufacture or sale of another's product as his own. For a number of reasons, parallel import cases are very different.

First, parallel imports do not involve the pirating of trademarks. The trademarks at issue are placed on the goods by the trademark owner itself.

Second, the goods and trademarks at issue are not counterfeit; they are genuine.6/

6/ This is confirmed by the legislative history of the Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, Ch. 15, 98 Stat. 2178. See S. Rep. No. 526, 98th Cong., 2d Sess. 3 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 3627, 3629.

Third, there is a substantial question as to whether a trademark owner suffers a loss of profit, cognizable by law, in parallel import transactions since the owner of the trademark has received his profit on the first sale of the trademark goods.

Fourth, by definition there can be no confusion of source in parallel imports cases, since the goods emanate from the trademark owner.

The argument that the domestic subsidiary of a foreign parent has built up some protectable goodwill, independent of the parent, makes no sense and has been rejected by the courts. It is hard to believe that U.S. consumers identify Japanese manufactured products, distributed throughout the world under the "SONY" name, as emanating from a domestic corporation. It does not make any sense to say that American consumers associate the SONY trademark with the SONY subsidiary which distributes SONY products in the United States, or that identical SONY goods do not bear genuine SONY trademarks. Nor does it make any sense to say that SONY Corporation of America has a goodwill separate from that of the foreign parent which directs its operations, advertises worldwide and manufactures all its merchandise.

In any event, the U.S. Supreme Court rejected this "territorial goodwill" concept in K mart Corporation v. Cartier Inc., et al. Despite repeated argument in favor of the "territorial goodwill" theory, no justice endorsed this theory in his opinion in K mart. Indeed, no justice recognized any protectable interest of a U.S. subsidiary in its trademark and goodwill, separate from the property interest of the foreign parent.[7]

Dispelling Some Myths

Proponents of S. 626 have recited a parade of so called "evils" connected with parallel imports. But the truth is that the driving force behind their support of the bill is the desire to maintain high prices and profits in the United States rather than concern for the American consumer. This is shown by the fact that it is the proponents of this bill who have made the situation what it is today. The solution to those so-called "problems" is also in their hands. There is no need to amend the Lanham Act.

1. First, it should not be forgotten that there would be no market in the United States for free market goods if there were no discriminatory pricing by the multinationals. The

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[7] Cartier and other plaintiffs had argued to the Supreme Court that the early decision of the Supreme Court in A. Bourjois & Co. v. Katzel, 260 U.S. 689 (1923), adopted the "territoriality" theory of trademarks. Justice Brennan however found that A. Bourjois was limited to its facts. Justice Scalia went further finding that "§ 42 of the Lanham Act . . . prohibits importation of goods of foreign or domestic manufacturers bearing not genuine trademarks identical to a United States trademark, but trademarks that 'copy or simulate' a recorded trademark." 486 U.S. at 320 n.1. All nine justices agreed that Customs could allow importation of goods in the "case 2" situation in which a foreign parent corporation and a domestic subsidiary sell identical goods bearing the same trademark.

multinationals set their prices and only they can change their prices. If their U.S. prices were reasonable, there would be no incentive to market parallel imports.

2. We are at a loss to understand claims that domestic jobs will be impaired by parallel imports. U.S. trademark owners who elect to manufacture overseas have already taken the first, and most important, step in curtailing U.S. employment when they elect to move their operations overseas. In a majority of parallel import cases, the trademark owner does not even manufacture goods in the United States. Most parallel imports emanate from foreign parents, who have no manufacturing facilities in the U.S.

3. The multinationals complain that parallel imports are "different" and "cause confusion" or that they are low in quality or obsolete models. If the goods are different or confusing, why do they have identical names and trademarks?[8/] The mere fact that a product sold overseas is slightly different from the one sold by the U.S. subsidiary, does not mean that the overseas product is inferior, that the consumer is deceived, or that the manufacturer is injured. Some manufacturers sell overseas product directly to U.S. retailers, and also sell a slightly different product marketed by their U.S. subsidiary to the same retailer. Obviously, no one is hurt. And if the multinationals

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[8/] There has been no showing by the proponents of this legislation of the dollar amount of parallel imports which are physically different from supposedly authorized merchandise sold in the U.S. Nor has there been any attempt to quantify the extent or significance of physical differences in any specific product categories.

are concerned, they can change the names or packaging of their products. Recently, Colgate-Palmolive announced it would change the name of one of its products in Europe from Viadent (the name used in the United States) to Veadent in France and Colgate Periogard in the rest of Europe. United States Trademark Association, General News Bulletin, at 7 (Dec. 8, 1989).

4. As for quality of the parallel imports, let us not forget that these are goods manufactured by the multinationals themselves. Retailers of parallel imports do not produce the goods. Are the multinationals admitting that they are dumping low quality or obsolete products on European customers when those goods have the identical trademarks and names as the goods they sell in the United States? If there is a problem, its solution is in the hands of the owner of the trademark.

5. The multinationals cry "crocodile tears" about the U.S. consumer, who they claim is being deceived in parallel import transactions. The answer is threefold:

(a) There is no need to create new laws to deal with deception. There are many state and federal laws, including Section 5 of the F.T.C. Act, 15 U.S.C. § 45, which can be used to prosecute deception in parallel import transactions.

(b) The FTC report on parallel imports notes that ". . . Commission staff investigations of consumer deception in connection with gray market goods have not produced evidence of substantial systematic deception to date."[9/]

[9/] "Comments of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission on Gray Market (footnote continued)

(c) The trademark owner can place warnings on his packaging that will eliminate any deception.

6. The multinationals claim that warranties are not available on parallel imports. If, and when, such a problem arises, it is because the U.S. manufacturers' representatives refuse to issue and honor warranties on parallel imports.

Under existing federal law, the Magnuson-Moss Warranty Act (15 U.S.C. § 2301 et seq.) and implementing regulations (16 C.F.R. § 700 et seq.), manufacturers of consumer products sold in the United States are required to honor the written warranties they provide with their products unless they explicitly disclaim those warranties in writing. Thus, if a foreign manufacturer wishes to disclaim its warranty on products it does not intend to sell on the U.S. market, it has the right to do so by so labeling those products. If the manufacturer chooses not to limit its warranty, it is required by federal law to honor it. In addition, many state laws impose similar obligations on manufacturers.

Manufacturers or their "authorized" distributors and dealers who refuse to honor their warranties on the ground that parallel imports were bought from "unauthorized" retailers are therefore violating federal law, and the Federal Trade Commission should take legal action against them. They may also be subject to similar state and local action as well as private suits. By refusing to honor their warranties, the manufacturers are indeed

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(footnote continued from previous page)
Policy Options Facing The United States Customs Service," at 6 (Oct. 17, 1986).

creating a "consumer protection problem" with parallel imports, but they can hardly be taken seriously when the "problem" is created by their own illegal act.[10/]

Finally, most discount retailers, including IMRA member stores, offer even more extensive warranties than the manufacturers. Many retailers have a "consumer satisfaction" or "satisfaction always" policy.

7. The multinationals claim that the prices on many parallel imports are the same or higher than the U.S. manufacturers' prices. If that were true, the parallel imports would not compete with the goods manufactured in the United States, and the multinationals would have no basis for complaint.

8. The multinationals claim American retailers are free riding on their investment. This claim implies we are receiving some sort of unjust enrichment or "something for nothing." That is not true. Advertising by American retailers has as much (or more) to do with building the popularity of particular brand names as does manufacturer advertising. At K mart, we spend many millions of dollars advertising the brands of imported goods we carry.

[10/] There is ample economic justification for enforcing federal and other warranty laws against the manufacturers. They have sold their products abroad at a profit, having calculated into their price some margin for repair, replacement or refund for defective products. If the product required repair in the manufacturer's own country or in some other country, the manufacturer would expect to incur the cost of repairing it. There is no reason for the manufacturer to escape that cost if its defective product is sold abroad and finds its way to the United States.

Of equal importance in answering charges of free riding, when the goods are purchased overseas, the foreign distributor receives full price for the goods, the same price that would have been charged to anyone. The multinationals cannot claim that anyone is receiving something for nothing.

What they are complaining about is that since we have avoided paying the artificially high U.S. price, we have somehow unjustly gained from their advertising in this country. There is a very simple solution, however: Have a different name overseas, just as Colgate-Palmolive has done. This would also prevent any possible arguments about erosion of goodwill resulting from a slightly different product, which the multinationals may have chosen to create.

9. Finally, health and safety considerations raised by the proponents of the bill are red herrings. The proponents assume that Congress intended the Lanham Act to remedy every perceived evil ranging from inaccurate net weight statements to unsafe dyes and colorants. The Lanham Act is not the controlling authority on such matters. Statutes such as the Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 301 et seq., govern the contents and labelling of cosmetics, food items and the like. Likewise, federal and state warranty, labelling and consumer protection statutes, such as the Fair Packaging and Labelling Act, 15 U.S.C. § 1451 et seq., and the Magnuson-Moss Warranty Act, 15 U.S.C.

§ 2301 et seq., govern the responsibility of retailers, distributors and manufacturers (whether foreign or domestic) for consumer goods.[11]

Conclusion

Parallel imports greatly benefit both consumers and competition in the marketplace.

The so-called problems cited by the multinationals are not really problems at all, but if they are, they are problems of the multinationals' own making and just as easily remedied by the multinationals.

Passage of S. 626 will deny the American consumer the ability to purchase quality merchandise at a fair, non-discriminatory price, and will only benefit foreign multinational companies.

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[11] The Lanham Act does provide, however, that if the multinationals deceive the public by using the same trademark on a foreign product that, by their own admission, is different from and inferior to a product destined for the American market, the trademark is forfeited. 15 U.S.C. § 1055. This is a sensible rule. Americans abroad will be disappointed and not purchase the domestic versions of products upon their return to the United States, if, as the multinationals claim, the products marketed by their affiliates abroad are inferior to the products marketed in the United States under the same trademarks. In short, it is the responsibility of a trademark owner to assure that licensees and affiliated companies do not affix the trademark to products of inferior quality. See, e.g., Oberlin v. Marlin American Corp., 596 F.2d 1322 (7th Cir. 1979); Siegel v. Chicken Delight, Inc. 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972).

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April 2, 1990

Ms. Janis Long
Subcommittee on Patents, Copyrights and Trademarks
of the Senate Committee on the Judiciary
327 Senate Hart Office Building
Washington, D.C. 20510

Re: Subcommittee Hearing on S. 626

Dear Ms. Long:

Attached is a copy of a survey by Market Probe International, Inc. entitled, "Consumer Opinions Relative to the Purchase of Four Product Categories." This survey is referred to in the testimony of A. Robert Stevenson.

Sincerely,

Robert W. Steele

Robert W. Steele

RWS/ljb

Enclosure

CONSUMER OPINIONS RELATIVE TO THE PURCHASE OF FOUR PRODUCT CATEGORIES

- A CENTRAL LOCATION SURVEY -

Prepared For:

STEELE, SIMMONS & FORNACIARI
Washington, D.C.

September, 1984

MARKET PROBE INTERNATIONAL, INC.
One Park Avenue
New York, New York. 10016

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INTRODUCTION

INTRODUCTION

This report presents the findings of a study designed to examine the relative importance of selected attributes which consumers might consider when deciding to purchase various products. A total of 602 people were interviewed between September 4th and September 8th, 1984.

Qualified respondents were those who had purchased one of the following items in the past year or so, or who intended to purchase one of these items in the next two years:

- A camera priced at $75 or higher
- A wrist watch priced at $75 or higher
- A perfume priced at $15 an ounce or higher
- An automobile tire priced at $50 or higher.

Responses to these screening questions are shown in Table 8.

In order to maximize the representativeness of the sample, a stratified sampling approach was used. The sample was evenly divided among males and females 18 years of age and over, and was systematically distributed across primary age groupings. In addition, the survey was dispersed geographically across 12 markets - Atlanta, Boston, Chicago, Houston, Los Angeles and Phoenix - with interviewing conducted at central mall facilities, two per area. A table detailing the demographic characteristics of the sample appears on the next two pages.

Table A

Sample Characteristics

Base:	Total Respondents (602) %
Sex	
Male	50
Female	50
Respondent Age	
18 - 24	20
25 - 34	15
35 - 44	25
45 - 49	9
50 - 54	11
55 - 64	12
65 or older	8
Employment Status	
Employed	65
Full-time	52
Part-time	13
Not employed	35
Marital Status	
Married	58
Single	33
Widowed	2
Divorced/Separated	7

Base:	Among Married Respondents (350) %
Employment Status Of Spouse	
Employed	65
Full-time	60
Part-time	5
Not employed	35

(Continued)

Table A

Sample Characteristics
(Continued)

Base:	Total Respondents (602) %
Education	
Less than high school	6
High school graduate	31
Some college	34
College graduate	19
Post college	9
Total Number Of Household Members	
One person	14
Two persons	33
Three persons	21
Four persons	18
Five or more persons	14
Total Annual Household Income	
Under $15,000	14
$15,000 - $19,999	13
$20,000 - $24,999	13
$25,000 - $34,999	19
$35,000 - $49,999	18
$50,000 or more	18
Refused	5
Race/Ethnic Background	
White	78
Black	15
Hispanic	4
Other	3
Market	
Atlanta	17
Boston	17
Chicago	17
Houston	17
Los Angeles	16
Phoenix	16

Table B

Purchase Behavior/Intentions For Four Products

	Selected Products:		
	Purchased In Last Year Or Two	Plan To Purchase In Next Year Or Two	Either Purchased Or Plan To Buy
Base: Total Respondents	(602)		
	%	%	%
Products			
35mm camera priced at $75 or higher	24	18	41
Wrist watch priced at $75 or higher	31	16	44
Perfume priced at $15 an ounce or higher	36	23	48
Automobile tire priced at $50 or higher .	46	31	66
None of the above	14	25	-

HIGHLIGHTS OF THE FINDINGS

HIGHLIGHTS OF THE FINDINGS

- Asked how important they considered each of a series of eight product attributes in selecting four different products ...
  - . a 35mm camera priced at $75 or higher,
  - . a wrist watch priced at $75 or higher,
  - . A perfume priced at $15 an ounce or higher,
  - . An automobile tire priced at $50 or higher ... ,

  survey respondents consistently attached the greatest importance to the value for the money represented by the product, and its price. Substantial majorities cite these two attributes as "very important" for all four products.

- In addition, large proportions rated the availability of a product warranty as "very important" in connection with three of the four products, excepting perfume.

- Brand name is consistently perceived as a "very important" attribute by about half to three-fifths of all interviewees, while product appearance is considered "very important" in choosing a wrist watch by almost three out of four survey participants, but is seen as somewhat less critical for the other three categories.

- Of the eight attributes asked about, packaging, the retailer selling the item and the country of manufacture tend to be less frequently checked as key considerations.

- Also asked how important it would be to know or check three items of information relating to each of these products, assuming the item "were imported from another country," large majorities (ranging from 69% to 79%) indicated that it would be "very important" to know whether the item was authentic or a copy.

- Substantially smaller percentages (ranging from 35% for perfume, to 67% for an automobile tire) indicated that it would be "very important" to check or know the identity of the warranty backer - whether it was provided by a trademark owner, a domestic distributor, or a retailer.

- Knowing or checking whether the item was imported by a trademark owner or a domestic distributor appeared to be least important to survey participants. Proportions ranging from only 33% to 46% rated this information "very important."

- By a margin of better than two to one, consumers would clearly prefer to pay a lower price for an item and accept a warranty from a distributor or retailer rather than pay a higher price and receive a warranty from the trademark owner.

  . Two out of three would prefer to pay $75 with the distributor or retailer warranty

  versus

  . Just under a third who would prefer to pay $100 with a warranty from the trademark owner.

Table C

Proportions Considering Selected Attributes "Very Important" When Choosing Various Merchandise Items

	Merchandise Items			
	35mm Camera For $75 +	Wrist Watch For $75 +	Perfume For $15 + Per Ounce	Automobile Tire For $50
Attributes	%	%	%	%
Value for the money	81	83	64	87
Packaging	18	20	32	15
Store selling the product	30	34	26	38
Price	68	68	64	80
Availability of a product warranty ..	72	72	30	85
Brand name	49	52	55	58
Appearance of the product	46	72	46	46
Country in which the product was produced/manufactured	31	34	36	45

Table D

Proportions Considering Certain Information "Very Important" In Selecting Various Merchandise Items

	Merchandise Items			
	35mm Camera For $75 +	Wrist Watch For $75 +	Perfume For $15 + Per Ounce	Automobile Tire For $50
Very Important To Know Or Check Whether Item ...	%	%	%	%
Was authentic or an imitation or a copy	79	79	69	79
Warranty is provided by a trademark owner, a domestic distributor or a retailer	55	57	35	67
Was brought into the U.S. by a trademark owner or a domestic distributor	34	41	33	46

FINDINGS OF THE STUDY

A. IMPORTANT CONSIDERATIONS IN SELECTING A 35mm CAMERA

1. Importance of Selected Attributes In Choosing A 35mm Camera

Respondents were asked how important they considered each of a series of eight product attributes (or features) in selecting a 35mm camera priced at $75 or higher.

The product factors considered "very important" by the largest proportions, from two-thirds to four-fifths, are ...

- the value for the money (81%),
- the availability of a product warranty (72%),
- the price (68%).

All three of these characteristics were checked as very important by comparably high proportions in all markets and in all major demographic subgroups.

Brand name (49%) and product appearance (46%) are considered very important by somewhat lower proportions, about half of all respondents, while the store selling the product and the country of manufacture are named significantly less often, by about one out of three (30% and 31%, respectively). Similar percentages (36% and 33%, respectively) consider these two attributes "not very" or "not at all important."

The factor least often thought of as very important is the packaging of the product, cited by less than one consumer in five (18%). Over half (54%) consider packaging unimportant.

Table 1

Proportions Considering Selected Attributes Important When Choosing A 35mm Camera Priced At $75 Or Higher

Attributes	Very Important	Somewhat Important	Not Very/ Not At All Important
	%	%	%
Value for the money	81	14	5
Availability of a product warranty ...	72	21	6
Price	68	26	6
Brand name	49	36	14
Appearance of the product	46	37	16
Store selling the product	30	36	33
Country in which the product was produced/manufactured	31	33	36
Packaging	18	28	54

Q. 1: In choosing a 35mm camera priced at $75 or higher, either for your own use or to give as a gift, how important would you personally rate each of the features listed below?

2. Importance Of Selected Information In Purchasing A 35mm Camera

Respondents were also asked how important it would be for them to know or check on three specific areas of information about a 35mm camera priced at $75 or higher, assuming it were imported from another country.

As shown in Table 2, about four out of five respondents (79%) consider it very important to know or check whether the camera is an imitation or a copy, with the "very important" percentages ranging from 74% in Houston to 84% in Boston. Another one in eight respondents (13%) consider this information "somewhat important to know or check."

The identity of the warranty provider is considered very important by just over half of all consumers (55%) and by slightly higher proportions among the less affluent (under $15,000 annual income, 62%), the less educated (high school or less education, 60%), and by older respondents (50 years of age or older, 68%). This information is rated somewhat important by just over one in four respondents and important by close to one in five.

Less critical is the identity of the importer, rated very important by only one-third of the sample: 34% consider it very important to know or check whether the item was imported by a trademark owner or a domestic distributor, 30% consider this information somewhat important. Note that over a third perceive this information as relatively secondary (not very important, 21%; not at all important, 14%).

Table 2

Proportions Considering Certain Information Important When Selecting An Imported 35mm Camera Priced At $75 Or Higher

Importance Of Knowing/ Checking Whether Camera ...	Very Important	Somewhat Important	Not Very/ Not At All Important
	%	%	%
Was authentic or an imitation/copy ...	79	13	8
Warranty is provided by trademark owner or domestic distributor/ retailer ...	55	27	18
Was brought into U.S. by trademark owner or domestic distributor ...	34	30	35

Q. 2: Assuming that this 35mm camera priced at $75 or higher were imported from another country, how important would it be for you to check on or know ... ?

B. IMPORTANT CONSIDERATIONS IN SELECTING A BETTER WRIST WATCH

1. Importance of Selected Attributes In Choosing A Better Wrist Watch

Survey participants were also asked the importance they attached to various product characteristics in selecting a wrist watch priced at $75 or higher.

In this instance, four attributes were rated very important by two-thirds or more of the interviewees, and a fifth attribute was perceived as important by about half:

- value for the money (83%)
- appearance (72%)
- availability of a product warranty (72%)
- price (68%)
- brand name (52%).

While there are some group-to-group variations, these five attributes are considered important by high percentages in all markets and in all demographic subgroups.

In comparison, the identity of the retailer and the country of manufacture appeared to be somewhat less critical, and were rated very important by only one out of three respondents (34% and 33%, respectively). About the same proportions rated these factors unimportant.

Packaging, once again, is less frequently seen as a central factor, rated very important by only one-fifth of all interviewees (20%) while about half think of it as a secondary consideration.

Table 3

Proportions Considering Selected Attributes Important When Choosing A Wrist Watch Priced At $75 Or Higher

Attributes	Very Important %	Somewhat Important %	Not Very/ Not At All Important %
Value for the money	83	14	3
Price	68	26	6
Appearance of the product	72	21	7
Availability of a product warranty	72	20	8
Brand name	52	35	13
Store selling the product	34	35	31
Country in which the product was produced/manufactured	33	34	33
Packaging	20	31	49

Q. 1: In choosing a wrist watch priced at $75 or higher, either for your own use or to give as a gift, how important would you personally rate each of the features listed below?

2. Importance Of Selected Information In Purchasing A Better Wrist Watch

Asked how much importance they attached to knowing specific types of information about a better wrist watch, assuming it were imported, a large majority of survey participants (79%) indicated that it was very important to know whether the watch was authentic or an imitation/copy. Another 14% rated this information somewhat important. These opinions were reported fairly constantly across all markets and survey subgroups.

A much lower proportion (57%) claimed that it was very important to them to know or check on who was providing the product warranty, while one in six (16%) rated this information "not at all" or "not very important." This particular datum was considered essential by above-average proportions of older, less affluent and less educated respondents (from 67% to 72% in each group).

Only two-fifths of the sample (41%) felt that it was very important to know or check the identity of the importer. About another one-third (31%) considered this factor somewhat important. Again, the proportions perceiving this knowledge as highly important were highest among ...

- older people (53%),
- those in the under-$15,000 income group (52%) and
- respondents with a high school education or less (50%).

Over one-fourth of all interviewees (28%) characterized knowing whether the importer was the trademark owner or a domestic distributor as relatively unimportant.

Table 4

Proportions Considering Certain Information Important When Selecting A Wrist Watch Priced At $75 Or Higher

Importance Of Knowing/ Checking Whether Wrist Watch ...	Very Important	Somewhat Important	Not Very/ Not At All Important
	%	%	%
Was authentic or an imitation/copy ...	79	14	7
Warranty is provided by trademark owner or domestic distributor/ retailer	57	27	16
Was brought into U.S. by trademark owner or domestic distributor	41	31	28

Q. 2: Assuming that this wrist watch priced at $75 or higher were imported from another country, how important would it be for you to check on or know ... ?

C. IMPORTANT CONSIDERATIONS IN SELECTING A FINE PERFUME

1. Importance Of Selected Attributes In Choosing A Fine Perfume

Interviewees were also asked their opinions about the importance of a series of product features in selecting a perfume priced at $15 an ounce or higher.

As shown in Table 5, better than half of all respondents evaluated the following four attributes as very important, while close to half also perceived a fourth attribute as very important:

- price (64%)
- value for the money (64%)
- brand name (55%)
- appearance (46%).

In the case of perfume, the country of origin and the packaging were each checked as very important characteristics by fewer respondents, about one-third (36% and 32%, respectively), while smaller proportions stressed the importance of having a product warranty (30%) and the retailer selling the product (26%).

Note also that substantial proportions, from two-fifths to one-half the sample (42% to 51%), felt that the retailer, the country of origin, and the availability of a product warranty were lesser issues in connection with this product category.

Table 5

Proportions Considering Selected Attributes Important When Choosing A Perfume Priced At $15 An Ounce Or Higher

Attributes	Very Important	Somewhat Important	Not Very/ Not At All Important
	%	%	%
Price	64	24	12
Value for the money	64	23	12
Brand name	55	30	15
Appearance of the product	46	34	20
Country in which the product was produced/manufactured	36	21	42
Packaging	32	41	27
Availability of a product warranty	30	18	51
Store selling the product	26	33	41

Q. 1: In choosing a perfume priced at $15 an ounce or higher, either for your own use or to give as a gift, how important would you personally rate each of the features listed below?

2. Importance Of Selected Information In Purchasing A Fine Perfume

As with the other products asked about, interviewees were asked about the importance of knowing or checking on three information areas about perfume priced at $15 an ounce or higher, assuming it were an imported product.

While two-thirds (69%) feel it is very important to know or check whether the perfume is authentic or not, far smaller percentages - approximately one-third (35% and 33%, respectively) - attach high importance to knowing ...

- whether its warranty is provided by the trademark owner or by a domestic distributor/retailer,

or

- whether it was imported by a trademark owner or a domestic distributor.

Higher proportions (41% and 40%, respectively) rated these two information areas as "not very important" or "not at all important" to know or check.

In all three cases, knowledge about these areas of information is rated very important by above average proportions of older, less affluent, and less educated respondents.

Table 6

Proportions Considering Certain Information Important When Selecting A Perfume Priced At $15 An Ounce Or Higher

Importance Of Knowing/ Checking Whether Perfume ...	Very Important	Somewhat Important	Not Very/ Not At All Important
	%	%	%
Was authentic or an imitation/copy ...	69	15	16
Warranty is provided by trademark owner or domestic distributor/ retailer ...	35	24	40
Was brought into U.S. by trademark owner or domestic distributor ...	33	26	41

Q. 2: Assuming that this perfume priced at $15 an ounce or higher were imported from another country, how important would it be for you to check on or know ... ?

D. IMPORTANT CONSIDERATIONS IN SELECTING A QUALITY AUTOMOBILE TIRE

1. Importance Of Selected Attributes In Choosing A Quality Automobile Tire

Survey respondents were also asked how important they considered the same series of product attributes in selecting a fourth product, an automobile tire priced at $50 or higher.

For this product category, three attributes were considered very important by four out of five or more interviewees:

- value for the money (87%)
- product warranty (85%)
- price (80%).

Brand name is judged somewhat less critical; three-fifths (58%) rated this feature very important.

Product appearance, country of origin, and retailer are perceived as important characteristics by much smaller percentages:

- appearance (46%)
- country of origin (44%)
- retailer (38%).

Packaging is clearly a minor concern in selecting a better tire ("not very" or "not at all important," 68%).

Table 7

Proportions Considering Selected Attributes Important When Choosing An Automobile Tire Priced At $50 Or Higher

Attributes	Very Important	Somewhat Important	Not Very/ Not At All Important
	%	%	%
Value for the money	87	10	3
Availability of a product warranty	85	12	3
Price	80	15	4
Brand name	58	31	11
Appearance of the product	46	32	22
Country in which the product was produced/manufactured	44	23	33
Store selling the product	38	30	32
Packaging	14	18	68

Q. 1: In choosing an automobile tire priced at $50 or higher, either for your own use or to give as a gift, how important would you personally rate each of the features listed below?

2. Importance Of Selected Information In Selecting A Quality Automobile Tire

As with the other three products, the information item considered important to check by the largest proportion of respondents is the authenticity of the tire - whether it is authentic or an imitation/copy. Four out of five (79%) rate this information as very important.

Who issues the product warranty, whether a trademark owner or a domestic distributor/retailer, is judged very important by a slightly lower proportion, two out of three interviewees (67%).

The third information item, the identity of the importer, is considered less critical. Less than half (46%) perceive this as a very important concern, while almost a third (29%) feel this information is relatively unimportant.

As already noted in the other product categories, older less affluent and and less well educated respondents generally put the greatest emphasis on knowing or checking these information areas. However, interest in the tire's authenticity is about equally high in all economic groups.

Table 8

Proportions Considering Certain Information Important When Selecting An Automobile Tire Priced AT $50 Or Higher

Importance Of Knowing/ Checking Whether Automobile Tire ...	Very Important	Somewhat Important	Not Very/ Not At All Important
	%	%	%
Was authentic or an imitation/copy ...	79	12	9
Warranty is provided by trademark owner or domestic distributor/ retailer	67	18	15
Was brought into U.S. by trademark owner or domestic distributor	46	25	29

Q. 2: Assuming that this automobile tire priced at $50 or higher were imported from another country, how important would it be for you to check on or know ... ?

. PRICE/WARRANTY TRADE-OFF PREFERENCE

Asked whether they'd prefer to pay $100 for a 35mm camera or a wrist watch with a warranty from the trademark owner, or pay $75 for the same item with an equivalent warranty from the domestic distributor or retailer, respondents clearly opted for the combination of lower price and equivalent warranty, by a margin of better than two to one.

As shown below, two out of three interviewees (67%) said they'd choose to pay $75 with a warranty from the domestic distributor/retailer.

- This margin of preference was even higher among ...

- respondents in ...
    - Boston (76% versus 20%) and
    - Los Angeles (74% versus 26%)
- women (70% versus 30%) and
- college educated people (70% versus 29%).

Table 9

Trade-Off Preferences, Price And Warranty Provider

Would Prefer ...	Total %
to pay $100 for the item, with a warranty from the trademark owner	32
to pay $75 for the item, with a warranty from the domestic distributor, retail store or retail chain	67
Don't know, no answer	1

Q. 3: If you were purchasing a product such as a 35mm camera or a wrist watch, either for your own use or to give as a gift, which one of these two alternatives would you choose ... to pay $100 for the item with a warranty from a trademark owner, or to pay $75 for the same item with an equivalent warranty from a domestic distributor, retail store or retail chain?

APPENDIX A: THE QUESTIONNAIRE

MARKET PROBE INTERNATIONAL, INC.
One Park Avenue
New York, NY 10016

[212] 689-2556

PROJECT #588
SEPTEMBER, 1984
5 - 1

PRODUCT BUYING OPINION SURVEY
- SCREENING QUESTIONNAIRE -

MARKET:	(6)
Atlanta	1
Boston	2
Chicago	3
Houston...........	4
Los Angeles	5
Phoenix	6

Hello. I'm _______________ of Market Probe International. We're conducting a survey on peoples' buying preferences and we'd like to ask you a few questions.

A. RECORD RESPONDENT'S SEX. CHECK QUOTAS BEFORE SCREENING. (7)

Male	1
Female	2

B. First of all, into which of the following groups does your age fall ... (READ LIST AND CIRCLE BELOW.)? (8)

18 - 24	1
25 - 34	2
35 - 44	3
45 - 49	4
50 - 54	5
55 - 64	6
65 or older	7

CHECK QUOTAS WITHIN SEX AND TERMINATE IF OVER QUOTA. CIRCLE APPROPRIATE BOX BELOW.

QUESTION B - OVER QUOTA - MALES - AGE

01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18
19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35

QUESTION B - OVER QUOTA - FEMALES - AGE

01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18
19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35

C1. HAND RESPONDENT CARD A.
Please look at this list of products and tell me which of the items on the list you have purchased in the past year or two, either for your own use or as a gift for someone else. (CIRCLE IN GRID BELOW UNDER Q. C1 - PURCHASED IN PAST YEAR OR TWO.)

C2 And looking at the list again, are there any products on the list that you plan to buy in the next year or two, either for your own use or as a gift for someone else? (IF "YES," ASK:) Which items? (CIRCLE IN GRID BELOW UNDER Q. C2 - PLAN TO PURCHASE.)

	Q. C1	Q. C2
PRODUCTS	PURCHASED IN PAST YEAR OR TWO	PLAN TO PURCHASE
	(9)	(10)
A 35mm camera priced at $75 or higher	1	1
A wrist watch priced at $75 or higher	2	2
A perfume priced at $15 an ounce or higher	3	3
An automobile tire priced at $50 or higher	4	4
NONE OF THE ABOVE	5	5

INTERVIEWER: REVIEW ANSWERS TO QS. C1 AND C2.

- IF RESPONDENT HAS NOT PURCHASED ANY OF THE LISTED ITEMS (Q. C1) AND DOES NOT PLAN TO PURCHASE ANY OF THE LISTED ITEMS (Q. C2), TERMINATE AND CIRCLE BELOW. ALL OTHERS CONTINUE.

Q. C1, C2 - HAVE NOT PURCHASED/DO NOT PLAN TO PURCHASE LISTED ITEMS

01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18
19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35

VALIDATION #:

MARKET PROBE INTERNATIONAL, INC.
One Park Avenue
New York, NY 10016

[212] 689-2556

PROJECT #588

SEPTEMBER, 1984

PRODUCT BUYING OPINION SURVEY
- MAIN QUESTIONNAIRE -

There are various attributes which may be important when buying products such as the ones we've been discussing. Some people feel that some of these attributes are very important, while other attributes may be of lesser importance. Different people may place different degrees of importance on different sets of attributes.

INTERVIEWER: HAND RESPONDENT ANSWER BOOKLET [OPENED TO PAGE TWO] THAT IS THE SAME COLOR AS THIS QUESTIONNAIRE.

1. On this page is a list of attributes which might be associated with 35mm cameras priced at $75 or higher. For each attribute, I would like you to use the scale (POINT TO SCALE.) to indicate how important that particular attribute would be to you personally in choosing a 35mm camera priced at $75 or higher, either for your own use or to give as a gift. Please indicate how important the attributes would be to you whether or not you have actually purchased this item or are planning to purchase it.

Since all people are different, there are no right or wrong answers. All I am interested in are your feelings. Please start with the X'd attribute in the booklet, then continue going down the list, rating each attribute. When you reach the bottom of the list, go back to the top and continue rating the importance of each attribute until you have circled a number for each attribute listed, then continue with Question 2. Is that clear to you? (CHECK BOOKLET AFTER A MINUTE OR SO TO ENSURE RESPONDENT IS CIRCLING CORRECTLY.)

INTERVIEWER: QUESTION 2 APPEARS IN THE ANSWER BOOKLET.

3. If you were purchasing a product such as a 35mm camera or a wrist watch, either for your own use or to give as a gift, which of these two alternatives would you choose ... (READ LIST AND CIRCLE ONE BELOW.)? (11)

- To pay $100 for the item with a warranty from a trademark owner 1

OR

- To pay $75 for the same item with an equivalent warranty from a domestic distributor, retail store or retail chain 2

INTERVIEWER: ASK OF HOUSTON RESPONDENTS ONLY.

4. And now I would like to know how you feel about the Texas Blue Laws which currently prohibit the sale of certain kinds of merchandise on Sundays. Are you in favor of the present situation, or would you prefer to see it changed? (12)

Prefer present Blue Laws situation 1
Would like to see Blue Laws situation changed .. 2

Last, I have a few Census-type questions to be used only for classification.

A. Are you currently employed? (13)

Yes 1
No 2

IF "YES" IN Q. A, ASK:
B. Full- or part-time?

Full-time 3
Part-time 4

C. What is your marital status? (14)

Married 1
Single 2
Widowed 3
Divorced/Separated ... 4

IF "MARRIED" IN Q. C, ASK:
D. Is your spouse currently employed? (15)

Yes 1
No 2

IF "YES" IN Q. D, ASK:
E. Full- or part-time?

Full-time 3
Part-time 4

F. What is your level of educational attainment? (16)

Less than high school 1
High school graduate 2
Some college 3
College graduate 4
Post college 5

G. How many people, including yourself, live in your home? (WRITE IN NUMBER.)

NUMBER IN HOME: __________ (17)

H. Considering all sources of income from everyone in your household, is the total yearly income of your family under or over $15,000?

Under $15,000 1

Is it under $10,000 2

OR

Over $10,000 3

Over $15,000 .... 4 (18)

Is it: $15,000 - $19,999 ... 5
$20,000 - $24,999 ... 6
$25,000 - $34,999 ... 7
$35,000 - $49,999 ... 8
$50,000 or more 9

I. RECORD ETHNIC CHARACTERISTICS BY OBSERVATION. (19)

White 1
Black 2
Hispanic 3
Other (SPECIFY:)
______________________ 4

Thank you very much for your cooperation!

RESPONDENT'S NAME: ______________________ TEL. #: (____)____-______
ADDRESS: ______________________
CITY: ______________ STATE: __________ ZIP CODE: __________
INTERVIEWER'S NAME: ______________________ DATE: __________
VALIDATED BY: ______________________ DATE: __________

MARKET PROBE INTERNATIONAL, INC.
One Park Avenue
New York, NY 10016

(212) 689-2556

PROJECT #588

SEPTEMBER, 1984

PRODUCT BUYING OPINION SURVEY

- ANSWER BOOKLET -

RESPONDENT'S NAME: ____________________

VALIDATION #:

QUESTION ONE

IN CHOOSING A 35mm CAMERA PRICED AT $75 OR HIGHER, EITHER FOR YOUR OWN USE OR TO GIVE AS A GIFT, HOW IMPORTANT WOULD YOU PERSONALLY RATE EACH OF THE FEATURES LISTED BELOW? PLEASE START WITH THE X'D ATTRIBUTE AND RATE ITS IMPORTANCE TO YOU BY CIRCLING ONE NUMBER UNDER THE APPROPRIATE COLUMN HEADING FOR EACH ATTRIBUTE.

[PLEASE START WITH X'D ITEM.]	ATTRIBUTES	VERY IMPORTANT	SOMEWHAT IMPORTANT	NOT VERY IMPORTANT	NOT AT ALL IMPORTANT	
[ ]	THE VALUE FOR THE MONEY	1	2	3	4	(20)
[ ]	THE PACKAGING	1	2	3	4	(21)
[ ]	THE STORE SELLING THE PRODUCT	1	2	3	4	(22)
[ ]	THE PRICE	1	2	3	4	(23)
[ ]	THE AVAILABILITY OF A PRODUCT WARRANTY.	1	2	3	4	(24)
[ ]	THE BRAND NAME	1	2	3	4	(25)
[ ]	THE APPEARANCE OF THE PRODUCT	1	2	3	4	(26)
[ ]	THE COUNTRY IN WHICH THE PRODUCT WAS PRODUCED OR MANUFACTURED	1	2	3	4	(27)

PLEASE MAKE SURE YOU HAVE CIRCLED AN ANSWER FOR EACH OF THE ATTRIBUTES ABOVE BEFORE CONTINUING.

QUESTION TWO

ASSUMING THAT THIS 35mm CAMERA PRICED AT $75 OR HIGHER WERE IMPORTED FROM ANOTHER COUNTRY, HOW IMPORTANT WOULD IT BE FOR YOU TO CHECK ON OR KNOW

	VERY IMPORTANT	SOMEWHAT IMPORTANT	NOT VERY IMPORTANT	NOT AT ALL IMPORTANT	
A. WHETHER THE 35mm CAMERA WAS BROUGHT INTO THE UNITED STATES BY A TRADEMARK OWNER OR A DOMESTIC DISTRIBUTOR	1	2	3	4	(28)
B. WHETHER THE 35mm CAMERA WARRANTY IS PROVIDED BY A TRADEMARK OWNER, A DOMESTIC DISTRIBUTOR OR A RETAILER ...	1	2	3	4	(29)
C. WHETHER THE 35mm CAMERA WAS AUTHENTIC OR AN IMITATION OR A COPY ..	1	2	3	4	(30)

WHEN YOU HAVE FINISHED CIRCLING ONE NUMBER FOR EACH ITEM ON THE PAGE, PLEASE CONTINUE WITH THE FOLLOWING PAGE.

QUESTION ONE

NOW I WOULD LIKE TO KNOW HOW IMPORTANT YOU PERSONALLY WOULD CONSIDER EACH OF THE FOLLOWING ATTRIBUTES IN CHOOSING A WRIST WATCH PRICED AT $75 OR HIGHER EITHER FOR YOUR OWN USE OR TO GIVE AS A GIFT. PLEASE ANSWER, WHETHER OR NOT YOU HAVE PURCHASED OR ARE PLANNING TO PURCHASE THIS ITEM, BY CIRCLING ONE NUMBER UNDER THE APPROPRIATE COLUMN HEADING IN LINE WITH EACH FEATURE THAT BEST DESCRIBES THE IMPORTANCE OF THAT ATTRIBUTE TO YOU.

[PLEASE START WITH X'D ITEM.]	ATTRIBUTES	VERY IMPORTANT	SOMEWHAT IMPORTANT	NOT VERY IMPORTANT	NOT AT ALL IMPORTANT	
[ ]	THE VALUE FOR THE MONEY	1	2	3	4	(31)
[ ]	THE PACKAGING	1	2	3	4	(32)
[ ]	THE STORE SELLING THE PRODUCT	1	2	3	4	(33)
[ ]	THE PRICE	1	2	3	4	(34)
[ ]	THE AVAILABILITY OF A PRODUCT WARRANTY	1	2	3	4	(35)
[ ]	THE BRAND NAME	1	2	3	4	(36)
[ ]	THE APPEARANCE OF THE PRODUCT	1	2	3	4	(37)
[ ]	THE COUNTRY IN WHICH THE PRODUCT WAS PRODUCED OR MANUFACTURED	1	2	3	4	(38)

PLEASE MAKE SURE YOU HAVE CIRCLED AN ANSWER FOR EACH OF THE ATTRIBUTES ABOVE BEFORE CONTINUING.

QUESTION TWO

ASSUMING THIS WRIST WATCH PRICED AT $75 OR HIGHER WERE IMPORTED FROM ANOTHER COUNTRY, HOW IMPORTANT WOULD IT BE FOR YOU TO CHECK ON OR KNOW ...

	VERY IMPORTANT	SOMEWHAT IMPORTANT	NOT VERY IMPORTANT	NOT AT ALL IMPORTANT	
A. WHETHER THE WRIST WATCH WAS BROUGHT INTO THE UNITED STATES BY A TRADEMARK OWNER OR A DOMESTIC DISTRIBUTOR	1	2	3	4	(39)
B. WHETHER THE WRIST WATCH WARRANTY IS PROVIDED BY TRADEMARK OWNER, A DOMESTIC DISTRIBUTOR OR A RETAILER	1	2	3	4	(40)
C. WHETHER THE WRIST WATCH WAS AUTHENTIC OR AN IMITATION OR A COPY	1	2	3	4	(41)

WHEN YOU HAVE FINISHED CIRCLING ONE NUMBER FOR EACH ITEM ON THE PAGE, PLEASE CONTINUE WITH THE FOLLOWING PAGE.

QUESTION ONE

NOW I WOULD LIKE TO KNOW HOW IMPORTANT YOU PERSONALLY WOULD CONSIDER EACH OF THE FOLLOWING ATTRIBUTES IN CHOOSING A PERFUME PRICED AT $15 AN OUNCE OR HIGHER EITHER FOR YOUR OWN USE OR TO GIVE AS A GIFT. PLEASE ANSWER, WHETHER OR NOT YOU HAVE PURCHASED OR ARE PLANNING TO PURCHASE THIS ITEM, BY CIRCLING ONE NUMBER UNDER THE APPROPRIATE COLUMN HEADING IN LINE WITH EACH ATTRIBUTE THAT BEST DESCRIBES THE IMPORTANCE OF THAT ATTRIBUTE TO YOU.

[PLEASE START WITH X'D ITEM.] ↓	ATTRIBUTES	VERY IMPORTANT	SOMEWHAT IMPORTANT	NOT VERY IMPORTANT	NOT AT ALL IMPORTANT	
[ ]	THE VALUE FOR THE MONEY	1	2	3	4	(42)
[ ]	THE PACKAGING	1	2	3	4	(43)
[ ]	THE STORE SELLING THE PRODUCT	1	2	3	4	(44)
[ ]	THE PRICE	1	2	3	4	(45)
[ ]	THE AVAILABILITY OF A PRODUCT WARRANTY.	1	2	3	4	(46)
[ ]	THE BRAND NAME	1	2	3	4	(47)
[ ]	THE APPEARANCE OF THE PRODUCT	1	2	3	4	(48)
[ ]	THE COUNTRY IN WHICH THE PRODUCT WAS PRODUCED OR MANUFACTURED	1	2	3	4	(49)

PLEASE MAKE SURE YOU HAVE CIRCLED AN ANSWER FOR EACH OF THE ATTRIBUTES ABOVE BEFORE CONTINUING.

QUESTION TWO

ASSUMING THAT THIS PERFUME PRICED AT $15 OR HIGHER WERE IMPORTED FROM ANOTHER COUNTRY, HOW IMPORTANT WOULD IT BE FOR YOU TO CHECK ON OR KNOW ...

	VERY IMPORTANT	SOMEWHAT IMPORTANT	NOT VERY IMPORTANT	NOT AT ALL IMPORTANT	
A. WHETHER THE PERFUME WAS BROUGHT INTO THE UNITED STATES BY A TRADEMARK OWNER OR A DOMESTIC DISTRIBUTOR	1	2	3	4	(50)
B. WHETHER THE PERFUME WARRANTY IS PROVIDED BY A TRADEMARK OWNER, A DOMESTIC DISTRIBUTOR OR A RETAILER ...	1	2	3	4	(51)
C. WHETHER THE PERFUME WAS AUTHENTIC OR AN IMITATION OR A COPY ..	1	2	3	4	(52)

WHEN YOU HAVE FINISHED CIRCLING ONE NUMBER FOR EACH ITEM ON THE PAGE, PLEASE CONTINUE WITH THE FOLLOWING PAGE.

QUESTION ONE

NOW I WOULD LIKE TO KNOW HOW IMPORTANT YOU PERSONALLY WOULD CONSIDER EACH OF THE FOLLOWING ATTRIBUTES IN CHOOSING AN AUTOMOBILE TIRE PRICED AT $50 OR HIGHER EITHER FOR YOUR OWN USE OR TO GIVE AS A GIFT. PLEASE ANSWER, WHETHER OR NOT YOU HAVE PURCHASED OR ARE PLANNING TO PURCHASE THIS ITEM, BY CIRCLING ONE NUMBER UNDER THE APPROPRIATE COLUMN HEADING IN LINE WITH EACH ATTRIBUTE THAT BEST DESCRIBES THE IMPORTANCE OF THAT ATTRIBUTE TO YOU.

[PLEASE START WITH X'D ITEM.]	ATTRIBUTES	VERY IMPORTANT	SOMEWHAT IMPORTANT	NOT VERY IMPORTANT	NOT AT ALL IMPORTANT	
[ ]	THE VALUE FOR THE MONEY	1	2	3	4	(53)
[ ]	THE PACKAGING	1	2	3	4	(54)
[ ]	THE STORE SELLING THE PRODUCT	1	2	3	4	(55)
[ ]	THE PRICE	1	2	3	4	(56)
[ ]	THE AVAILABILITY OF A PRODUCT WARRANTY.	1	2	3	4	(57)
[ ]	THE BRAND NAME	1	2	3	4	(58)
[ ]	THE APPEARANCE OF THE PRODUCT	1	2	3	4	(59)
[ ]	THE COUNTRY IN WHICH THE PRODUCT WAS PRODUCED OR MANUFACTURED	1	2	3	4	(60)

PLEASE MAKE SURE YOU HAVE CIRCLED AN ANSWER FOR EACH OF THE ATTRIBUTES ABOVE BEFORE CONTINUING.

QUESTION TWO

ASSUMING THAT THIS AUTOMOBILE TIRE PRICED AT $50 OR HIGHER WERE IMPORTED FROM ANOTHER COUNTRY, HOW IMPORTANT WOULD IT BE FOR YOU TO CHECK ON OR KNOW ...

	VERY IMPORTANT	SOMEWHAT IMPORTANT	NOT VERY IMPORTANT	NOT AT ALL IMPORTANT	
A. WHETHER THE AUTOMOBILE TIRE WAS BROUGHT INTO THE UNITED STATES BY A TRADEMARK OWNER OR A DOMESTIC DISTRIBUTOR	1	2	3	4	(61)
B. WHETHER THE AUTOMOBILE TIRE WARRANTY IS PROVIDED BY A TRADEMARK OWNER, A DOMESTIC DISTRIBUTOR OR A RETAILER....	1	2	3	4	(62)
C. WHETHER THE AUTOMOBILE TIRE WAS AUTHENTIC OR AN IMITATION OR COPY.	1	2	3	4	(63)

WHEN YOU HAVE FINISHED CIRCLING ONE NUMBER FOR EACH ITEM ON THE PAGE, PLEASE RETURN THE ANSWER BOOKLET TO THE INTERVIEWER.

APPENDIX B: DETAILED CROSS TABULATIONS

PRODUCT BUYING OPINION SURVEY

MARKET

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
ATLANTA	101 16.8	101 100.0	•	•	•	•	•	36 17.1	32 15.8	33 17.7	51 16.8	50 16.8	6 7.3	49 17.9	35 16.3	46 20.4	55 14.7
BOSTON	101 16.8	•	101 100.0	•	•	•	•	34 16.1	34 16.7	31 16.7	51 16.8	49 16.4	11 13.4	37 13.5	49 22.8	23 10.2	76 20.4
CHICAGO	100 16.6	•	•	100 100.0	•	•	•	35 16.6	33 16.3	32 17.2	52 17.2	48 16.1	15 18.3	47 17.2	35 16.3	43 19.1	56 15.0
HOUSTON	100 16.6	•	•	•	100 100.0	•	•	34 16.1	34 16.7	32 17.2	50 16.5	50 16.8	6 7.3	55 20.1	34 15.8	35 15.6	65 17.4
LOS ANGELES	99 16.4	•	•	•	•	99 100.0	•	35 16.6	36 17.7	28 15.1	49 16.2	50 16.8	25 30.5	43 15.7	29 13.5	44 19.6	54 14.5
PHOENIX	99 16.4	•	•	•	•	•	99 100.0	36 17.1	34 16.7	29 15.6	50 16.5	49 16.4	19 23.2	42 15.3	32 14.9	34 15.1	65 17.4

Q.A SEX

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602	101	101	100	100	99	99	211	203	186	303	298	82	274	215	225	373
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
MALE	303	51	51	52	50	49	50	109	102	91	303	*	39	143	107	108	194
	50.3	50.5	50.5	52.0	50.0	49.5	50.5	51.7	50.2	48.9	100.0		47.6	52.2	49.8	48.0	52.0
FEMALE	298	50	49	48	50	50	49	102	100	95	*	298	43	130	108	117	178
	49.5	49.5	48.5	48.0	50.0	50.5	49.5	48.3	49.3	51.1		100.0	52.4	47.4	50.2	52.0	47.7

Q.8 AGE GROUP

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
18-24	121 20.1	18 17.8	23 22.8	19 19.0	20 20.0	20 20.2	20 20.2	121 57.3	*	*	60 19.8	61 20.5	24 29.3	62 22.6	31 14.4	53 23.6	68 18.2
25-34	90 15.0	18 17.8	11 10.9	16 16.0	14 14.0	15 15.2	16 16.2	90 42.7	*	*	49 16.2	41 13.8	15 18.3	38 13.9	32 14.9	20 8.9	70 18.8
35-44	151 25.1	27 26.7	25 24.8	22 22.0	27 27.0	26 26.3	24 24.2	*	151 74.4	*	76 25.1	75 25.2	9 11.0	63 23.0	71 33.0	35 15.6	113 30.3
45-49	52 8.6	5 5.0	9 8.9	11 11.0	7 7.0	10 10.1	10 10.1	*	52 25.6	*	26 8.6	25 8.4	6 7.3	24 8.8	19 8.8	18 8.0	34 9.1
50-54	63 10.5	12 11.9	14 13.9	5 5.0	13 13.0	11 11.1	7 7.1	*	*	63 33.9	26 8.6	37 12.4	6 7.3	28 10.2	27 12.6	30 13.3	33 8.8
55-64	73 12.1	11 10.9	13 12.9	19 19.0	12 12.0	9 9.1	9 9.1	*	*	73 39.2	30 9.9	43 14.4	13 15.9	31 11.3	25 11.6	38 16.9	35 9.4
65 OR OLDER	50 8.3	10 9.9	4 4.0	8 8.0	7 7.0	8 8.1	13 13.1	*	*	50 26.9	35 11.6	15 5.0	9 11.0	28 10.2	8 3.7	31 13.8	18 4.8
DON'T KNOW/NO ANSWER	2 0.3	*	2 2.0	*	*	*	*	*	*	*	1 0.3	1 0.3	*	*	2 0.9	*	2 0.5
MEAN	41.02	41.23	40.34	41.93	40.93	40.48	41.26	24.63	41.42	59.17	41.15	40.87	39.99	40.99	41.00	43.77	39.29
STANDARD DEVIATION	14.74	14.76	14.24	15.15	14.42	14.34	15.38	4.20	3.27	5.84	15.14	14.33	16.83	15.32	12.85	16.49	13.30
STANDARD ERROR	0.60	1.48	1.44	1.52	1.45	1.45	1.55	0.29	0.23	0.43	0.87	0.83	1.87	0.93	0.88	1.10	0.69

Q.C1 SELECTED PRODUCTS PURCHASED IN PAST YEAR OR TWO

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602	101	101	100	100	99	99	211	203	186	303	298	82	274	215	225	373
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
A 35MM CAMERA PRICED	145	28	23	27	21	21	25	60	55	29	88	57	11	60	67	34	111
AT $75 OR HIGHER	24.1	27.7	22.8	27.0	21.0	21.2	25.3	28.4	27.1	15.6	29.0	19.1	13.4	21.9	31.2	15.1	29.8
A WRIST WATCH PRICED	186	33	35	28	36	29	25	68	72	44	97	89	17	80	80	63	123
AT $75 OR HIGHER	30.9	32.7	34.7	28.0	36.0	29.3	25.3	32.2	35.5	23.7	32.0	29.9	20.7	29.2	37.2	28.0	33.0
A PERFUME PRICED AT	218	30	37	35	58	32	25	78	75	64	79	138	17	95	91	68	147
$15 AN OUNCE OR HIGHER	36.2	29.7	36.6	35.0	58.0	32.3	25.3	37.0	36.9	34.4	26.1	46.3	20.7	34.7	42.3	30.2	39.4
AN AUTOMOBILE TIRE	275	47	38	41	58	39	51	82	105	87	155	120	28	135	102	102	173
PRICED AT $50 OR HIGHER	5.7	46.5	37.6	41.0	58.0	39.4	51.5	38.9	51.7	46.8	51.2	40.3	34.1	49.3	47.4	45.3	46.4
NONE OF THE ABOVE	86	18	8	19	4	11	25	35	25	26	46	40	20	36	26	36	50
	14.3	17.8	7.9	19.0	4.0	11.1	25.3	16.6	12.3	14.0	15.2	13.4	24.4	13.1	12.1	16.0	13.4
DON'T KNOW/NO ANSWER	20	*	8	*	*	11	1	10	4	6	11	9	7	7	6	10	9
	3.3		7.9			11.1	1.0	4.7	2.0	3.2	3.6	3.0	8.5	2.6	2.8	4.4	2.4

Q.2 SELECTED PRODUCTS PLAN TO PURCHASE IN NEXT YEAR OR TWO

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602	101	101	100	100	99	99	211	203	186	303	298	82	274	215	225	373
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
A 35MM CAMERA PRICED	110	10	28	6	29	13	24	44	39	26	61	48	12	56	39	25	84
AT $75 OR HIGHER	18.3	9.9	27.7	6.0	29.0	13.1	24.2	20.9	19.2	14.0	20.1	16.1	14.6	20.4	18.1	11.1	22.5
A WRIST WATCH PRICED	99	9	18	14	20	19	18	40	32	26	50	49	15	47	34	37	61
AT $75 OR HIGHER	16.4	8.9	17.8	14.0	20.0	19.2	18.2	19.0	15.8	14.0	16.5	16.4	18.3	17.2	15.8	16.4	16.4
A PERFUME PRICED AT	141	16	24	24	33	16	25	59	46	35	58	83	21	54	61	47	92
$15 AN OUNCE OR HIGHER	23.4	15.8	23.8	24.0	33.0	16.2	25.3	28.0	22.7	18.8	19.1	27.9	25.6	19.7	28.4	20.9	24.7
AN AUTOMOBILE TIRE	187	28	23	36	24	32	43	67	63	57	111	76	24	84	73	70	116
PRICED AT $50 OR HIGHER	31.1	27.7	22.8	36.0	24.0	32.3	43.4	31.8	31.0	30.6	36.6	25.5	29.3	30.7	34.0	31.1	31.1
NONE OF THE ABOVE	152	48	18	30	28	11	17	48	48	56	75	77	16	67	54	61	91
	25.2	47.5	17.8	30.0	28.0	11.1	17.2	22.7	23.6	30.1	24.8	25.8	19.5	24.5	25.1	27.1	24.4
DON'T KNOW/NO ANSWER	46	*	21	1	*	22	2	11	19	15	28	18	10	21	13	18	28
	7.6		20.8	1.0		22.2	2.0	5.2	9.4	8.1	9.2	6.0	12.2	7.7	6.0	8.0	7.5

Q.C1 & 2 SELECTED PRODUCTS PURCHASED/PLAN TO PURCHASE

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
A 35MM CAMERA PRICED AT $75 OR HIGHER	246 40.9	38 37.6	48 47.5	33 33.0	48 48.0	33 33.3	46 46.5	99 46.9	92 45.3	53 28.5	142 46.9	103 34.6	22 26.8	111 40.5	103 47.9	58 25.8	187 50.1
A WRIST WATCH PRICED AT $75 OR HIGHER	263 43.7	42 41.6	49 48.5	38 38.0	48 48.0	46 46.5	39 39.4	98 46.4	96 47.3	67 36.0	135 44.6	128 43.0	29 35.4	117 42.7	105 48.8	97 43.1	165 44.2
A PERFUME PRICED AT $15 AN OUNCE OR HIGHER	292 48.5	39 38.6	50 49.5	50 50.0	71 71.0	44 44.4	37 37.4	113 53.6	95 46.8	83 44.6	118 38.9	173 58.1	33 40.2	129 47.1	114 53.0	101 44.9	187 50.1
AN AUTOMOBILE TIRE	398 66.1	66 65.3	52 51.5	72 72.0	71 71.0	62 62.6	74 74.7	127 60.2	146 71.9	124 66.7	227 74.9	171 57.4	50 61.0	191 69.7	143 66.5	150 66.7	247 66.2

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A 35MM CAMERA AT $75 OR HIGHER

THE VALUE FOR THE MONEY

		MARKET							AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	488 81.1	88 87.1	80 79.2	80 80.0	82 82.0	77 77.8	79 79.8	163 77.3	171 84.2	152 81.7	241 79.5	246 82.6	60 73.2	219 79.9	184 85.6	178 79.1	308 82.6
SOMEWHAT IMPORTANT (3)	81 13.5	10 9.9	15 14.9	15 15.0	11 11.0	16 16.2	14 14.1	37 17.5	22 10.8	22 11.8	41 13.5	40 13.4	15 18.3	40 14.6	23 10.7	35 15.6	44 11.8
NOT VERY IMPORTANT (2)	20 3.3	3 3.0	3 3.0	4 4.0	3 3.0	5 5.1	2 2.0	8 3.8	6 3.0	6 3.2	13 4.3	7 2.3	4 4.9	9 3.3	4 1.9	9 4.0	11 2.9
NOT AT ALL IMPORTANT (1)	9 1.5	*	*	1 1.0	4 4.0	1 1.0	3 3.0	2 0.9	3 1.5	4 2.2	6 2.0	3 1.0	1 1.2	6 2.2	2 0.9	2 0.9	7 1.9
DON'T KNOW/NO ANSWER	4 0.7	*	3 3.0	*	*	*	1 1.0	1 0.5	1 0.5	2 1.1	2 0.7	2 0.7	2 2.4	*	2 0.9	1 0.4	3 0.8
MEAN	3.75	3.84	3.79	3.74	3.71	3.71	3.72	3.72	3.79	3.75	3.72	3.79	3.68	3.72	3.83	3.74	3.76
STANDARD DEVIATION	0.59	0.44	0.48	0.58	0.71	0.61	0.65	0.58	0.56	0.62	0.64	0.53	0.63	0.63	0.49	0.57	0.59
STANDARD ERROR	0.02	0.04	0.05	0.06	0.07	0.06	0.07	0.04	0.04	0.05	0.04	0.03	0.07	0.04	0.03	0.04	0.03

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A 35MM CAMERA AT $75 OR HIGHER

THE PACKAGING

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	108 17.9	19 18.8	10 9.9	17 17.0	22 22.0	26 26.3	14 14.1	37 17.5	31 15.3	40 21.5	56 18.5	52 17.4	26 31.7	53 19.3	25 11.6	57 25.3	50 13.4
SOMEWHAT IMPORTANT (3)	168 27.9	27 26.7	27 26.7	23 23.0	29 29.0	34 34.3	27 27.3	69 32.7	55 27.1	44 23.7	76 25.1	91 30.5	20 24.4	76 27.7	65 30.2	62 27.6	105 28.2
NOT VERY IMPORTANT (2)	203 33.7	31 30.7	43 42.6	40 40.0	31 31.0	26 26.3	32 32.3	70 33.2	80 39.4	52 28.0	99 32.7	104 34.9	26 31.7	90 32.8	74 34.4	71 31.6	130 34.9
NOT AT ALL IMPORTANT (1)	121 20.1	24 23.8	19 18.8	20 20.0	18 18.0	13 13.1	26 26.3	35 16.6	36 17.7	49 26.3	71 23.4	50 16.8	10 12.2	54 19.7	50 23.3	34 15.1	87 23.3
DON'T KNOW/NO ANSWER	2 0.3	*	2 2.0	*	*	*	*	*	1 0.5	1 0.5	1 0.3	1 0.3	*	1 0.4	1 0.5	1 0.4	1 0.3
MEAN	2.44	2.41	2.28	2.37	2.58	2.74	2.29	2.51	2.40	2.41	2.39	2.49	2.76	2.47	2.30	2.63	2.32
STANDARD DEVIATION	1.00	1.05	0.89	0.99	1.02	0.99	1.01	0.97	0.95	1.10	1.04	0.97	1.03	1.02	0.96	1.02	0.98
STANDARD ERROR	0.04	0.10	0.09	0.10	0.10	0.10	0.10	0.07	0.07	0.08	0.06	0.06	0.11	0.06	0.07	0.07	0.05

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A 35MM CAMERA AT $75 OR HIGHER

THE STORE SELLING THE PRODUCT

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	181 30.1	27 26.7	28 27.7	28 28.0	31 31.0	37 37.4	30 30.3	44 20.9	58 28.6	78 41.9	90 29.7	91 30.5	37 45.1	74 27.0	57 26.5	87 38.7	92 24.7
SOMEWHAT IMPORTANT (3)	219 36.4	39 38.6	40 39.6	37 37.0	35 35.0	33 33.3	35 35.4	90 42.7	77 37.9	51 27.4	105 34.7	113 37.9	22 26.8	105 38.3	82 38.1	70 31.1	148 39.7
NOT VERY IMPORTANT (2)	123 20.4	20 19.8	20 19.8	20 20.0	20 20.0	23 23.2	18 18.2	48 22.7	44 21.7	31 16.7	62 20.5	61 20.5	14 17.1	57 20.8	47 21.9	42 18.7	80 21.4
NOT AT ALL IMPORTANT (1)	77 12.8	15 14.9	12 11.9	14 14.0	14 14.0	6 6.1	16 16.2	29 13.7	23 11.3	25 13.4	44 14.5	33 11.1	9 11.0	38 13.9	27 12.6	24 10.7	53 14.2
DON'T KNOW/NO ANSWER	2 0.3	*	1 1.0	1 1.0	*	*	*	*	1 0.5	1 0.5	2 0.7	*	*	*	2 0.9	2 0.9	*
MEAN	2.84	2.77	2.84	2.80	2.83	3.02	2.80	2.71	2.84	2.98	2.80	2.88	3.06	2.78	2.79	2.99	2.75
STANDARD DEVIATION	1.00	1.00	0.97	1.00	1.02	0.92	1.04	0.95	0.97	1.06	1.02	0.97	1.03	0.99	0.98	1.00	0.98
STANDARD ERROR	0.04	0.10	0.10	0.10	0.10	0.09	0.11	0.07	0.07	0.08	0.06	0.06	0.11	0.06	0.07	0.07	0.05

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A 35MM CAMERA AT $75 OR HIGHER

THE PRICE

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	410 68.1	73 72.3	66 65.3	69 69.0	69 69.0	68 68.7	63 63.6	134 63.5	147 72.4	127 68.3	185 61.1	224 75.2	61 74.4	185 67.5	143 66.5	155 68.9	251 67.3
SOMEWHAT IMPORTANT (3)	155 25.7	23 22.8	27 26.7	23 23.0	26 26.0	25 25.3	31 31.3	62 29.4	47 23.2	46 24.7	92 30.4	63 21.1	14 17.1	68 24.8	64 29.8	52 23.1	103 27.6
NOT VERY IMPORTANT (2)	27 4.5	4 4.0	6 5.9	6 6.0	3 3.0	5 5.1	3 3.0	12 5.7	7 3.4	8 4.3	16 5.3	11 3.7	5 6.1	15 5.5	6 2.8	13 5.8	14 3.8
NOT AT ALL IMPORTANT (1)	9 1.5	1 1.0	1 1.0	2 2.0	2 2.0	1 1.0	2 2.0	3 1.4	2 1.0	4 2.2	9 3.0	*	2 2.4	5 1.8	2 0.9	5 2.2	4 1.1
DON'T KNOW/NO ANSWER	1 0.2	*	1 1.0	*	*	*	*	*	*	1 0.5	1 0.3	*	*	1 0.4	*	*	1 0.3
MEAN	3.61	3.66	3.58	3.59	3.62	3.62	3.57	3.55	3.67	3.60	3.50	3.71	3.63	3.59	3.62	3.59	3.62
STANDARD DEVIATION	0.65	0.60	0.65	0.69	0.64	0.63	0.65	0.67	0.59	0.68	0.73	0.53	0.71	0.68	0.59	0.70	0.61
STANDARD ERROR	0.03	0.06	0.07	0.07	0.06	0.06	0.07	0.05	0.04	0.05	0.04	0.03	0.08	0.04	0.04	0.05	0.03

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A 35MM CAMERA AT $75 OR HIGHER

THE AVAILABILITY OF A PRODUCT WARRANTY

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	434 72.1	74 73.3	65 64.4	75 75.0	70 70.0	75 75.8	74 74.7	134 63.5	149 73.4	150 80.6	212 70.0	221 74.2	68 82.9	201 73.4	145 67.4	168 74.7	262 70.2
SOMEWHAT IMPORTANT (3)	125 20.8	22 21.8	24 23.8	22 22.0	24 24.0	16 16.2	16 16.2	62 29.4	40 19.7	22 11.8	65 21.5	60 20.1	8 9.8	56 20.4	52 24.2	41 18.2	84 22.5
NOT VERY IMPORTANT (2)	29 4.8	4 4.0	10 9.9	1 1.0	5 5.0	5 5.1	4 4.0	12 5.7	10 4.9	7 3.8	18 5.9	11 3.7	3 3.7	10 3.6	14 6.5	9 4.0	20 5.4
NOT AT ALL IMPORTANT (1)	11 1.8	1 1.0	1 1.0	2 2.0	1 1.0	1 1.0	5 5.1	3 1.4	1 0.5	7 3.8	6 2.0	5 1.7	2 2.4	7 2.6	2 0.9	5 2.2	6 1.6
DON'T KNOW/NO ANSWER	3 0.5	*	1 1.0	*	*	2 2.0	*	*	3 1.5	*	2 0.7	1 0.3	1 1.2	*	2 0.9	2 0.9	1 0.3
MEAN	3.64	3.67	3.53	3.70	3.63	3.70	3.61	3.55	3.69	3.69	3.60	3.67	3.75	3.65	3.60	3.67	3.62
STANDARD DEVIATION	0.66	0.80	0.71	0.59	0.63	0.61	0.79	0.67	0.59	0.72	0.69	0.63	0.64	0.67	0.65	0.66	0.66
STANDARD ERROR	0.03	0.06	0.07	0.06	0.06	0.06	0.08	0.05	0.04	0.05	0.04	0.04	0.07	0.04	0.04	0.04	0.03

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A 35MM CAMERA AT $75 OR HIGHER

THE BRAND NAME

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	295 49.0	55 54.5	37 36.6	51 51.0	53 53.0	49 49.5	48 48.5	89 42.2	96 47.3	110 59.1	140 46.2	154 51.7	47 57.3	132 48.2	103 47.9	119 52.9	173 46.4
SOMEWHAT IMPORTANT (3)	219 36.4	28 27.7	49 48.5	34 34.0	35 35.0	33 33.3	40 40.4	84 39.8	82 40.4	51 27.4	111 36.6	108 36.2	22 26.8	97 35.4	83 38.6	73 32.4	145 38.9
NOT VERY IMPORTANT (2)	62 10.3	11 10.9	9 8.9	13 13.0	8 8.0	13 13.1	8 8.1	28 13.3	17 8.4	17 9.1	33 10.9	29 9.7	9 11.0	30 10.9	22 10.2	25 11.1	37 9.9
NOT AT ALL IMPORTANT (1)	23 3.8	7 6.9	4 4.0	2 2.0	3 3.0	4 4.0	3 3.0	10 4.7	7 3.4	6 3.2	16 5.3	7 2.3	4 4.9	13 4.7	6 2.8	7 3.1	16 4.3
DON'T KNOW/NO ANSWER	3 0.5	•	2 2.0	•	1 1.0	•	•	•	1 0.5	2 1.1	3 1.0	•	•	2 0.7	1 0.5	1 0.4	2 0.5
MEAN	3.31	3.30	3.20	3.34	3.39	3.28	3.34	3.19	3.32	3.44	3.25	3.37	3.37	3.28	3.32	3.36	3.28
STANDARD DEVIATION	0.81	0.82	0.77	0.78	0.76	0.84	0.75	0.84	0.77	0.79	0.85	0.75	0.86	0.84	0.77	0.80	0.81
STANDARD ERROR	0.03	0.09	0.08	0.08	0.08	0.08	0.08	0.06	0.05	0.06	0.05	0.04	0.10	0.05	0.05	0.05	0.04

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A 35MM CAMERA AT $75 OR HIGHER

THE APPEARANCE OF THE PRODUCT

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	278 46.2	48 47.5	41 40.6	41 41.0	54 54.0	53 53.5	40 40.4	97 46.0	91 44.8	88 47.3	143 47.2	134 45.0	47 57.3	129 47.1	84 39.1	105 46.7	171 45.8
SOMEWHAT IMPORTANT	(3)	224 37.2	36 35.6	40 39.6	44 44.0	34 34.0	30 30.3	40 40.4	86 40.8	75 36.9	63 33.9	112 37.0	112 37.6	22 26.8	102 37.2	91 42.3	83 36.9	140 37.5
NOT VERY IMPORTANT	(2)	64 10.6	9 8.9	10 9.9	12 12.0	7 7.0	14 14.1	12 12.1	20 9.5	27 13.3	17 9.1	29 9.6	35 11.7	7 8.5	27 9.9	26 12.1	26 11.6	37 9.9
NOT AT ALL IMPORTANT	(1)	32 5.3	8 7.9	7 6.9	3 3.0	5 5.0	1 1.0	7 7.1	7 3.3	9 4.4	16 8.6	17 5.6	15 5.0	5 6.1	16 5.8	11 5.1	9 4.0	23 6.2
DON'T KNOW/NO ANSWER		4 0.7	*	3 3.0	*	*	1 1.0	*	1 0.5	1 0.5	2 1.1	2 0.7	2 0.7	1 1.2	*	3 1.4	2 0.9	2 0.5
MEAN		3.25	3.23	3.17	3.23	3.37	3.38	3.14	3.30	3.23	3.21	3.27	3.23	3.37	3.26	3.17	3.27	3.24
STANDARD DEVIATION		0.85	0.91	0.88	0.77	0.82	0.76	0.89	0.77	0.84	0.93	0.85	0.85	0.88	0.86	0.84	0.82	0.87
STANDARD ERROR		0.03	0.09	0.09	0.08	0.08	0.08	0.09	0.05	0.06	0.07	0.05	0.05	0.10	0.05	0.06	0.06	0.05

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A
35MM CAMERA AT $75 OR HIGHER

THE COUNTRY IN WHICH THE PROD.WAS PRODUCED/MANUFACTURED

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	186 30.9	30 29.7	22 21.8	41 41.0	28 28.0	39 39.4	26 26.3	47 22.3	58 28.6	80 43.0	99 32.7	86 28.9	31 37.8	87 31.8	60 27.9	83 36.9	102 27.3
SOMEWHAT IMPORTANT (3)	199 33.1	34 33.7	38 37.6	31 31.0	32 32.0	24 24.2	38 38.4	65 30.8	70 34.5	64 34.4	94 31.0	105 35.2	23 28.0	86 31.4	77 35.8	76 33.8	120 32.2
NOT VERY IMPORTANT (2)	114 18.9	22 21.8	22 21.8	9 9.0	26 26.0	17 17.2	18 18.2	51 24.2	42 20.7	21 11.3	50 16.5	64 21.5	15 18.3	54 19.7	40 18.6	38 16.9	76 20.4
NOT AT ALL IMPORTANT (1)	102 16.9	15 14.9	18 17.8	19 19.0	14 14.0	19 19.2	17 17.2	48 22.7	33 16.3	21 11.3	59 19.5	43 14.4	13 15.9	47 17.2	37 17.2	28 12.4	74 19.8
DON'T KNOW/NO ANSWER	1 0.2	*	1 1.0	*	*	*	*	*	*	*	1 0.3	*	*	*	1 0.5	*	1 0.3
MEAN	2.78	2.78	2.64	2.94	2.74	2.84	2.74	2.53	2.75	3.09	2.77	2.79	2.88	2.78	2.75	2.85	2.67
STANDARD DEVIATION	1.06	1.03	1.02	1.12	1.02	1.14	1.03	1.07	1.04	0.99	1.11	1.02	1.09	1.07	1.05	1.02	1.08
STANDARD ERROR	0.04	0.10	0.10	0.11	0.10	0.12	0.10	0.07	0.07	0.07	0.06	0.06	0.12	0.06	0.07	0.07	0.06

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED
35MM CAMERA AT $75 OR HIGHER

BROUGHT INTO U.S. BY TRADEMARK OWNER OR DOMESTIC DISTRIBUTOR

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	207 34.4	37 36.6	24 23.8	46 46.0	27 27.0	37 37.4	36 36.4	45 21.3	70 34.5	91 48.9	102 33.7	104 34.9	37 45.1	94 34.3	66 30.7	96 42.7	111 29.8
SOMEWHAT IMPORTANT (3)	182 30.2	28 27.7	28 27.7	22 22.0	36 36.0	39 39.4	29 29.3	74 35.1	58 28.6	50 26.9	83 27.4	99 33.2	28 34.1	82 29.9	64 29.8	69 30.7	112 30.0
NOT VERY IMPORTANT (2)	128 21.3	19 18.8	27 26.7	22 22.0	20 20.0	16 16.2	22 22.2	57 27.0	50 24.6	21 11.3	70 23.1	58 19.5	9 11.0	63 23.0	45 20.9	38 16.9	88 23.6
NOT AT ALL IMPORTANT (1)	85 14.1	17 16.8	22 21.8	10 10.0	17 17.0	7 7.1	12 12.1	35 16.6	25 12.3	24 12.9	48 15.8	37 12.4	8 9.8	35 12.8	40 18.6	22 9.8	62 16.6
DON'T KNOW/NO ANSWER	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN	2.85	2.84	2.53	3.04	2.73	3.07	2.90	2.61	2.85	3.12	2.79	2.91	3.15	2.86	2.73	3.06	2.73
STANDARD DEVIATION	1.05	1.10	1.08	1.04	1.04	0.90	1.03	1.00	1.03	1.05	1.08	1.02	0.96	1.03	1.09	0.99	1.06
STANDARD ERROR	0.04	0.11	0.11	0.10	0.10	0.09	0.10	0.07	0.07	0.08	0.06	0.06	0.11	0.06	0.07	0.07	0.05

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED
35MM CAMERA AT $75 OR HIGHER

WARRANTY PROVIDED BY TRADEMARK OWNER OR DOMESTIC DISTRIBUTOR

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	329 54.7	54 53.5	45 44.6	56 56.0	49 49.0	61 61.6	64 64.6	81 38.4	120 59.1	127 68.3	164 54.1	164 55.0	51 62.2	148 54.0	114 53.0	136 60.4	192 51.5
SOMEWHAT IMPORTANT	(3)	163 27.1	31 30.7	35 34.7	26 26.0	28 28.0	23 23.2	18 18.2	84 39.8	42 20.7	37 19.9	73 24.1	90 30.2	21 25.6	78 28.5	53 24.7	61 27.1	100 26.8
NOT VERY IMPORTANT	(2)	70 11.6	11 10.9	11 10.9	15 15.0	12 12.0	10 10.1	10 10.1	30 14.2	27 13.3	12 6.5	42 13.9	28 9.4	5 6.1	33 12.0	27 12.6	19 8.4	50 13.4
NOT AT ALL IMPORTANT	(1)	40 6.6	5 5.0	10 9.9	3 3.0	10 10.0	5 5.1	7 7.1	16 7.6	14 6.9	10 5.4	24 7.9	16 5.4	5 6.1	14 5.1	21 9.8	9 4.0	31 8.3
DON'T KNOW/NO ANSWER		*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN		3.30	3.33	3.14	3.35	3.17	3.41	3.40	3.09	3.32	3.51	3.24	3.35	3.44	3.32	3.21	3.44	3.21
STANDARD DEVIATION		0.92	0.86	0.97	0.84	0.98	0.86	0.93	0.91	0.95	0.84	0.97	0.86	0.86	0.87	1.00	0.81	0.97
STANDARD ERROR		0.04	0.09	0.10	0.08	0.10	0.09	0.09	0.06	0.07	0.06	0.06	0.05	0.10	0.05	0.07	0.05	0.05

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED
35MM CAMERA AT $75 OR HIGHER

AUTHENTIC OR AN IMITATION OR A COPY

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	478 79.4	77 76.2	85 84.2	80 80.0	74 74.0	78 78.8	82 82.8	157 74.4	164 80.8	155 83.3	234 77.2	243 81.5	64 78.0	217 79.2	174 80.9	176 78.2	298 79.9
SOMEWHAT IMPORTANT (3)	76 12.6	13 12.9	11 10.9	12 12.0	16 16.0	16 16.2	8 8.1	33 15.6	25 12.3	18 9.7	39 12.9	37 12.4	12 14.6	34 12.4	25 11.6	33 14.7	43 11.5
NOT VERY IMPORTANT (2)	30 5.0	7 6.9	4 4.0	3 3.0	5 5.0	5 5.1	6 6.1	13 6.2	11 5.4	6 3.2	18 5.9	12 4.0	5 6.1	14 5.1	8 3.7	10 4.4	20 5.4
NOT AT ALL IMPORTANT (1)	18 3.0	4 4.0	1 1.0	5 5.0	5 5.0	*	3 3.0	8 3.8	3 1.5	7 3.8	12 4.0	6 2.0	1 1.2	9 3.3	8 3.7	6 2.7	12 3.2
DON'T KNOW/NO ANSWER	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN	3.68	3.61	3.78	3.67	3.59	3.74	3.71	3.61	3.72	3.73	3.63	3.73	3.70	3.68	3.70	3.68	3.68
STANDARD DEVIATION	0.70	0.78	0.56	0.76	0.80	0.54	0.71	0.77	0.63	0.70	0.77	0.63	0.64	0.72	0.71	0.68	0.72
STANDARD ERROR	0.03	0.08	0.06	0.08	0.08	0.05	0.07	0.05	0.04	0.05	0.04	0.04	0.07	0.04	0.05	0.05	0.04

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A WRIST WATCH AT $75 OR HIGHER

THE VALUE FOR THE MONEY

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	499 82.9	88 87.1	79 78.2	86 86.0	81 81.0	80 80.8	83 83.8	164 77.7	174 85.7	160 86.0	239 78.9	259 86.9	68 82.9	223 81.4	182 84.7	189 84.0	307 82.3
SOMEWHAT IMPORTANT (3)	85 14.1	12 11.9	19 18.8	10 10.0	15 15.0	15 15.2	14 14.1	39 18.5	24 11.8	21 11.3	51 16.8	34 11.4	10 12.2	41 15.0	29 13.5	29 12.9	55 14.7
NOT VERY IMPORTANT (2)	7 1.2	*	1 1.0	3 3.0	1 1.0	2 2.0	*	4 1.9	2 1.0	1 0.5	5 1.7	2 0.7	3 3.7	4 1.5	*	3 1.3	4 1.1
NOT AT ALL IMPORTANT (1)	9 1.5	1 1.0	*	1 1.0	3 3.0	2 2.0	2 2.0	3 1.4	2 1.0	4 2.2	7 2.3	2 0.7	1 1.2	6 2.2	2 0.9	4 1.8	5 1.3
DON'T KNOW/NO ANSWER	2 0.3	*	2 2.0	*	*	*	*	1 0.5	1 0.5	*	1 0.3	1 0.3	*	*	2 0.9	*	2 0.5
MEAN	3.79	3.85	3.79	3.81	3.74	3.75	3.80	3.73	3.83	3.81	3.73	3.85	3.77	3.76	3.84	3.79	3.79
STANDARD DEVIATION	0.53	0.43	0.43	0.52	0.63	0.59	0.53	0.57	0.47	0.54	0.61	0.42	0.57	0.59	0.44	0.55	0.52
STANDARD ERROR	0.02	0.04	0.04	0.05	0.06	0.06	0.05	0.04	0.03	0.04	0.04	0.02	0.06	0.04	0.03	0.04	0.03

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A WRIST WATCH AT $75 OR HIGHER

THE PACKAGING

		MARKET							AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	118 19.6	20 19.8	8 7.9	19 19.0	27 27.0	28 28.3	16 16.2	40 19.0	37 18.2	41 22.0	52 17.2	66 22.1	27 32.9	52 19.0	31 14.4	57 25.3	60 16.1
SOMEWHAT IMPORTANT	(3)	189 31.4	27 26.7	39 38.6	28 28.0	31 31.0	36 36.4	27 27.3	74 35.1	66 32.5	49 26.3	91 30.0	97 32.6	21 25.6	91 33.2	71 33.0	73 32.4	114 30.6
NOT VERY IMPORTANT	(2)	181 30.1	31 30.7	31 30.7	35 35.0	25 25.0	26 26.3	33 33.3	69 32.7	66 32.5	45 24.2	91 30.0	90 30.2	22 26.8	84 30.7	64 29.8	60 26.7	120 32.2
NOT AT ALL IMPORTANT	(1)	112 18.6	23 22.8	23 22.8	18 18.0	15 15.0	9 9.1	23 23.2	28 13.3	34 16.7	49 26.3	68 22.4	44 14.8	12 14.6	46 16.8	48 22.3	34 15.1	78 20.9
DON'T KNOW/NO ANSWER		2 0.3	*	*	*	2 2.0	*	*	*	*	2 1.1	1 0.3	1 0.3	*	1 0.4	1 0.5	1 0.4	1 0.3
MEAN		2.52	2.44	2.32	2.48	2.71	2.84	2.36	2.60	2.52	2.45	2.42	2.62	2.77	2.55	2.40	2.68	2.42
STANDARD DEVIATION		1.01	1.05	0.91	0.99	1.03	0.94	1.01	0.94	0.97	1.11	1.02	0.99	1.06	0.98	0.98	1.01	0.99
STANDARD ERROR		0.04	0.10	0.09	0.10	0.10	0.09	0.10	0.06	0.07	0.08	0.06	0.06	0.12	0.06	0.07	0.07	0.05

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A WRIST WATCH AT $75 OR HIGHER

THE STORE SELLING THE PRODUCT

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	204 33.9	34 33.7	28 27.7	32 32.0	38 38.0	36 36.4	36 36.4	48 22.7	64 31.5	91 48.9	83 27.4	120 40.3	39 47.6	81 29.6	71 33.0	92 40.9	110 29.5
SOMEWHAT IMPORTANT (3)	208 34.6	37 36.6	35 34.7	34 34.0	32 32.0	33 33.3	35 35.4	86 40.8	73 36.0	48 25.8	102 33.7	106 35.6	19 23.2	105 38.3	75 34.9	69 30.7	138 37.0
NOT VERY IMPORTANT (2)	138 22.9	18 17.8	29 28.7	26 26.0	20 20.0	25 25.3	20 20.2	65 30.8	48 23.6	25 13.4	83 27.4	55 18.5	18 22.0	64 23.4	48 22.3	47 20.9	90 24.1
NOT AT ALL IMPORTANT (1)	49 8.1	12 11.9	7 6.9	8 8.0	9 9.0	5 5.1	8 8.1	12 5.7	17 8.4	20 10.8	32 10.6	17 5.7	6 7.3	23 8.4	19 8.8	16 7.1	33 8.8
DON'T KNOW/NO ANSWER	3 0.5	*	2 2.0	*	1 1.0	*	*	*	1 0.5	2 1.1	3 1.0	*	*	1 0.4	2 0.9	1 0.4	2 0.5
MEAN	2.95	2.92	2.85	2.90	3.00	3.01	3.00	2.81	2.91	3.14	2.79	3.10	3.11	2.89	2.93	3.06	2.88
STANDARD DEVIATION	0.95	0.99	0.91	0.94	0.97	0.90	0.94	0.85	0.94	1.02	0.97	0.90	0.99	0.93	0.95	0.95	0.94
STANDARD ERROR	0.04	0.10	0.09	0.09	0.10	0.09	0.10	0.06	0.07	0.08	0.06	0.05	0.11	0.06	0.07	0.06	0.05

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A WRIST WATCH AT $75 OR HIGHER

THE PRICE

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	408 67.8	66 65.3	65 64.4	69 69.0	71 71.0	68 68.7	67 67.7	139 65.9	136 67.0	133 71.5	187 61.7	221 74.2	62 75.6	181 66.1	144 67.0	152 67.6	253 67.8
SOMEWHAT IMPORTANT (3)	154 25.6	32 31.7	31 30.7	21 21.0	20 20.0	24 24.2	26 26.3	59 28.0	54 26.6	40 21.5	90 29.7	64 21.5	13 15.9	71 25.9	62 28.8	52 23.1	102 27.3
NOT VERY IMPORTANT (2)	27 4.5	*	4 4.0	9 9.0	6 6.0	4 4.0	4 4.0	8 3.8	10 4.9	9 4.8	16 5.3	11 3.7	5 6.1	15 5.5	6 2.8	13 5.8	14 3.8
NOT AT ALL IMPORTANT (1)	11 1.8	3 3.0	1 1.0	1 1.0	2 2.0	2 2.0	2 2.0	5 2.4	2 1.0	4 2.2	9 3.0	2 0.7	2 2.4	7 2.6	2 0.9	8 3.6	3 0.8
DON'T KNOW/NO ANSWER	1 0.2	*	*	*	1 1.0	*	*	*	1 0.5	*	1 0.3	*	*	*	1 0.5	*	1 0.3
MEAN	3.60	3.59	3.58	3.58	3.62	3.62	3.60	3.57	3.60	3.62	3.51	3.69	3.65	3.55	3.63	3.55	3.63
STANDARD DEVIATION	0.66	0.65	0.62	0.70	0.69	0.66	0.67	0.68	0.63	0.68	0.73	0.57	0.70	0.71	0.58	0.76	0.60
STANDARD ERROR	0.03	0.06	0.06	0.07	0.07	0.07	0.07	0.05	0.04	0.05	0.04	0.03	0.08	0.04	0.04	0.05	0.03

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A WRIST WATCH AT $75 OR HIGHER

THE AVAILABILITY OF A PRODUCT WARRANTY

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	433 71.9	76 75.2	69 68.3	73 73.0	72 72.0	69 69.7	73 73.7	133 63.0	145 71.4	154 82.8	207 68.3	225 75.5	66 80.5	192 70.1	154 71.6	173 76.9	256 68.6
SOMEWHAT IMPORTANT (3)	122 20.3	20 19.8	19 18.8	19 19.0	17 17.0	25 25.3	21 21.2	61 28.9	41 20.2	19 10.2	66 21.8	56 18.8	14 17.1	58 21.2	42 19.5	33 14.7	89 23.9
NOT VERY IMPORTANT (2)	33 5.5	4 4.0	12 11.9	5 5.0	7 7.0	2 2.0	3 3.0	14 6.6	12 5.9	7 3.8	20 6.6	13 4.4	*	16 5.8	15 7.0	9 4.0	24 6.4
NOT AT ALL IMPORTANT (1)	13 2.2	1 1.0	1 1.0	3 3.0	3 3.0	3 3.0	2 2.0	3 1.4	5 2.5	5 2.7	9 3.0	4 1.3	2 2.4	8 2.9	3 1.4	9 4.0	4 1.1
DON'T KNOW/NO ANSWER	1 0.2	*	*	*	1 1.0	*	*	*	*	1 0.5	1 0.3	*	*	*	1 0.5	1 0.4	*
MEAN	3.62	3.69	3.54	3.62	3.60	3.62	3.67	3.54	3.61	3.74	3.56	3.68	3.76	3.58	3.62	3.65	3.60
STANDARD DEVIATION	0.69	0.59	0.74	0.72	0.75	0.68	0.64	0.68	0.71	0.66	0.75	0.62	0.58	0.73	0.68	0.74	0.66
STANDARD ERROR	0.03	0.06	0.07	0.07	0.08	0.07	0.06	0.05	0.05	0.05	0.04	0.04	0.06	0.04	0.05	0.05	0.03

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A WRIST WATCH AT $75 OR HIGHER

THE BRAND NAME

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602	101	101	100	100	99	99	211	203	186	303	298	82	274	215	225	373
		100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
VERY IMPORTANT	(4)	314	55	45	55	56	55	48	97	101	115	148	165	51	137	110	131	180
		52.2	54.5	44.6	55.0	56.0	55.6	48.5	46.0	49.8	61.8	48.8	55.4	62.2	50.0	51.2	58.2	48.3
SOMEWHAT IMPORTANT	(3)	211	28	45	37	33	28	38	83	72	55	108	103	17	100	82	69	141
		35.0	27.7	44.6	37.0	33.0	28.3	38.4	39.3	35.5	29.6	35.6	34.6	20.7	36.5	38.1	30.7	37.8
NOT VERY IMPORTANT	(2)	53	11	8	6	8	11	9	24	20	9	30	23	12	21	17	16	37
		8.8	10.9	7.9	6.0	8.0	11.1	9.1	11.4	9.9	4.8	9.9	7.7	14.6	7.7	7.9	7.1	9.9
NOT AT ALL IMPORTANT	(1)	23	7	2	2	3	5	4	7	9	7	16	7	2	15	6	9	14
		3.8	6.9	2.0	2.0	3.0	5.1	4.0	3.3	4.4	3.8	5.3	2.3	2.4	5.5	2.8	4.0	3.8
DON'T KNOW/NO ANSWER		1	*	1	*	*	*	*	*	1	*	1	*	*	1	*	*	1
		0.2		1.0						0.5		0.3			0.4			0.3
MEAN		3.36	3.30	3.33	3.45	3.42	3.34	3.31	3.26	3.31	3.49	3.28	3.43	3.43	3.32	3.38	3.43	3.31
STANDARD DEVIATION		0.80	0.92	0.71	0.70	0.76	0.87	0.80	0.79	0.82	0.76	0.85	0.74	0.83	0.84	0.75	0.79	0.80
STANDARD ERROR		0.03	0.09	0.07	0.07	0.08	0.09	0.08	0.05	0.06	0.06	0.05	0.04	0.09	0.05	0.05	0.05	0.04

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A WRIST WATCH AT $75 OR HIGHER

THE APPEARANCE OF THE PRODUCT

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602	101	101	100	100	99	99	211	203	186	303	298	82	274	215	225	373
		100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
VERY IMPORTANT	(4)	434	69	80	67	78	66	71	153	144	135	205	228	60	195	153	160	271
		72.1	68.3	79.2	67.0	78.0	66.7	71.7	72.5	70.9	72.6	67.7	76.5	73.2	71.2	71.2	71.1	72.7
SOMEWHAT		127	21	17	24	15	26	24	43	44	40	72	55	15	62	47	51	75
IMPORTANT	(3)	21.1	20.8	16.8	24.0	15.0	26.3	24.2	20.4	21.7	21.5	23.8	18.5	18.3	22.6	21.9	22.7	20.1
NOT VERY		32	10	1	7	5	7	2	13	12	7	19	13	7	14	9	11	21
IMPORTANT	(2)	5.3	9.9	1.0	7.0	5.0	7.1	2.0	6.2	5.9	3.8	6.3	4.4	8.5	5.1	4.2	4.9	5.6
NOT AT ALL		8	1	2	2	1	*	2	2	2	4	6	2	*	3	5	2	6
IMPORTANT	(1)	1.3	1.0	2.0	2.0	1.0		2.0	0.9	1.0	2.2	2.0	0.7		1.1	2.3	0.9	1.6
DON'T KNOW/NO ANSWER		1	*	1	*	*	*	*	*	1	*	1	*	*	*	1	1	*
		0.2		1.0						0.5		0.3				0.5	0.4	
MEAN		3.64	3.56	3.75	3.56	3.72	3.60	3.66	3.64	3.63	3.65	3.58	3.71	3.65	3.64	3.63	3.65	3.64
STANDARD DEVIATION		0.65	0.71	0.57	0.71	0.60	0.62	0.62	0.64	0.64	0.66	0.70	0.58	0.63	0.63	0.68	0.62	0.66
STANDARD ERROR		0.03	0.07	0.06	0.07	0.06	0.06	0.06	0.04	0.05	0.05	0.04	0.03	0.07	0.04	0.05	0.04	0.03

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A WRIST WATCH AT $75 OR HIGHER

THE COUNTRY IN WHICH THE PROD.WAS PRODUCED/MANUFACTURED

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	202 33.6	40 39.6	24 23.8	36 36.0	31 31.0	40 40.4	31 31.3	43 20.4	61 30.0	97 52.2	104 34.3	97 32.6	38 46.3	85 31.0	70 32.6	85 37.8	116 31.1
SOMEWHAT IMPORTANT (3)	202 33.6	25 24.8	38 37.6	33 33.0	41 41.0	27 27.3	37 37.4	78 37.0	70 34.5	54 29.0	94 31.0	108 36.2	22 26.8	98 35.8	68 31.6	79 35.1	121 32.4
NOT VERY IMPORTANT (2)	125 20.8	23 22.8	20 19.8	20 20.0	20 20.0	22 22.2	19 19.2	56 26.5	47 23.2	22 11.8	60 19.8	65 21.8	16 19.5	54 19.7	49 22.8	45 20.0	79 21.2
NOT AT ALL IMPORTANT (1)	72 12.0	13 12.9	18 17.8	11 11.0	8 8.0	10 10.1	12 12.1	34 16.1	25 12.3	13 7.0	44 14.5	28 9.4	6 7.3	37 13.5	27 12.6	16 7.1	56 15.0
DON'T KNOW/NO ANSWER	1 0.2	*	1 1.0	*	*	*	*	*	*	*	1 0.3	*	*	*	1 0.5	*	1 0.3
MEAN	2.89	2.91	2.68	2.94	2.95	2.98	2.88	2.62	2.82	3.26	2.85	2.92	3.12	2.84	2.85	3.04	2.80
STANDARD DEVIATION	1.01	1.06	1.03	1.00	0.91	1.01	0.99	0.98	1.00	0.92	1.05	0.96	0.97	1.01	1.02	0.93	1.04
STANDARD ERROR	0.04	0.11	0.10	0.10	0.09	0.10	0.10	0.07	0.07	0.07	0.06	0.06	0.11	0.06	0.07	0.06	0.05

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED
WRIST WATCH AT $75 OR HIGHER

BROUGHT INTO U.S. BY TRADEMARK OWNER OR DOMESTIC DISTRIBUTOR

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100:0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	246 40.9	46 45.5	26 25.7	46 46.0	42 42.0	47 47.5	39 39.4	59 28.0	88 43.3	98 52.7	108 35.6	137 46.0	43 52.4	112 40.9	79 36.7	112 49.8	133 35.7
SOMEWHAT IMPORTANT (3)	186 30.9	28 27.7	36 35.6	34 34.0	27 27.0	31 31.3	30 30.3	76 36.0	57 28.1	53 28.5	100 33.0	86 28.9	27 32.9	90 32.8	59 27.4	72 32.0	111 29.8
OT VERY IMPORTANT (2)	100 16.6	14 13.9	20 19.8	15 15.0	16 16.0	15 15.2	18 18.2	46 21.8	38 18.7	16 8.6	53 17.5	47 15.8	8 9.8	38 13.9	47 21.9	25 11.1	75 20.1
OT AT ALL IMPORTANT (1)	70 11.6	13 12.9	19 18.8	5 5.0	15 15.0	6 6.1	12 12.1	30 14.2	20 9.9	19 10.2	42 13.9	28 9.4	4 4.9	34 12.4	30 14.0	16 7.1	54 14.5
ON'T KNOW/NO ANSWER	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
EAN	3.01	3.06	2.68	3.21	2.96	3.20	2.97	2.78	3.05	3.24	2.90	3.11	3.33	3.02	2.87	3.24	2.87
TANDARD DEVIATION	1.02	1.05	1.05	0.88	1.09	0.91	1.03	1.01	1.01	0.98	1.04	0.89	0.84	1.02	1.06	0.91	1.06
TANDARD ERROR	0.04	0.11	0.11	0.09	0.11	0.09	0.10	0.07	0.07	0.07	0.06	0.06	0.09	0.06	0.07	0.06	0.05

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED
WRIST WATCH AT $75 OR HIGHER

WARRANTY PROVIDED BY TRADEMARK OWNER OR DOMESTIC DISTRIBUTOR

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	ATLANTA	BOSTON	CHICAGO	HOUSTON	LOS ANGELES	PHOENIX	18-34	35-49	50+	MALE	FEMALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	340 56.5	62 61.4	45 44.6	59 59.0	53 53.0	62 62.6	59 59.6	90 42.7	119 58.6	130 69.9	158 52.1	181 60.7	59 72.0	153 55.8	109 50.7	150 66.7	189 50.7
SOMEWHAT IMPORTANT	(3)	164 27.2	26 25.7	38 37.6	29 29.0	29 29.0	18 18.2	23 23.2	76 36.0	51 25.1	37 19.9	90 29.7	74 24.8	15 18.3	81 29.6	60 27.9	53 23.6	108 29.0
NOT VERY IMPORTANT	(2)	62 10.3	8 7.9	10 9.9	9 9.0	9 9.0	15 15.2	10 10.1	30 14.2	21 10.3	10 5.4	33 10.9	29 9.7	4 4.9	24 8.8	30 14.0	13 5.8	49 13.1
NOT AT ALL IMPORTANT	(1)	36 6.0	5 5.0	8 7.9	3 3.0	9 9.0	4 4.0	7 7.1	15 7.1	12 5.9	9 4.8	22 7.3	14 4.7	4 4.9	16 5.8	16 7.4	9 4.0	27 7.2
DON'T KNOW/NO ANSWER		*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN		3.34	3.44	3.19	3.44	3.26	3.39	3.35	3.14	3.36	3.55	3.27	3.42	3.57	3.35	3.22	3.53	3.23
STANDARD DEVIATION		0.89	0.84	0.91	0.78	0.96	0.89	0.92	0.91	0.89	0.80	0.92	0.85	0.80	0.87	0.95	0.78	0.94
STANDARD ERROR		0.04	0.08	0.09	0.08	0.10	0.09	0.09	0.06	0.06	0.06	0.05	0.05	0.09	0.05	0.06	0.05	0.05

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED
WRIST WATCH AT $75 OR HIGHER

AUTHENTIC OR AN IMITATION OR A COPY

		MARKET							AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	476 79.1	79 78.2	88 87.1	80 80.0	75 75.0	76 76.8	77 77.8	156 73.9	161 79.3	157 84.4	234 77.2	241 80.9	68 82.9	216 78.8	168 78.1	184 81.8	288 77.2
SOMEWHAT IMPORTANT (3)	84 14.0	13 12.9	10 9.9	15 15.0	13 13.0	15 15.2	17 17.2	36 17.1	28 13.8	20 10.8	45 14.9	39 13.1	12 14.6	42 15.3	26 12.1	30 13.3	54 14.5
NOT VERY IMPORTANT (2)	26 4.3	7 6.9	1 1.0	4 4.0	4 4.0	7 7.1	3 3.0	14 6.6	8 3.9	4 2.2	12 4.0	14 4.7	1 1.2	9 3.3	14 6.5	7 3.1	19 5.1
NOT AT ALL IMPORTANT (1)	16 2.7	2 2.0	2 2.0	1 1.0	8 8.0	1 1.0	2 2.0	5 2.4	6 3.0	5 2.7	12 4.0	4 1.3	1 1.2	7 2.6	7 3.3	4 1.8	12 3.2
DON'T KNOW/NO ANSWER	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN	3.69	3.67	3.82	3.74	3.55	3.68	3.71	3.63	3.69	3.77	3.65	3.73	3.79	3.70	3.65	3.75	3.66
STANDARD DEVIATION	0.68	0.69	0.53	0.58	0.90	0.65	0.62	0.71	0.68	0.62	0.74	0.61	0.51	0.65	0.74	0.60	0.72
STANDARD ERROR	0.03	0.07	0.05	0.06	0.09	0.07	0.06	0.05	0.05	0.05	0.04	0.04	0.06	0.04	0.05	0.04	0.04

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A PERFUME AT $15 AN OUNCE OR HIGHER

THE VALUE FOR THE MONEY

		MARKET							AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	386 64.1	67 66.3	52 51.5	66 66.0	74 74.0	66 66.7	59 59.6	117 55.5	132 65.0	137 73.7	177 58.4	208 69.8	63 76.8	176 64.2	129 60.0	153 68.0	230 61.7
SOMEWHAT IMPORTANT (3)	140 23.3	21 20.8	30 29.7	23 23.0	15 15.0	23 23.2	28 28.3	66 31.3	43 21.2	30 16.1	79 26.1	61 20.5	15 18.3	66 24.1	50 23.3	50 22.2	89 23.9
NOT VERY IMPORTANT (2)	41 6.8	8 7.9	10 9.9	8 8.0	4 4.0	6 6.1	5 5.1	12 5.7	21 10.3	8 4.3	21 6.9	20 6.7	3 3.7	15 5.5	20 9.3	12 5.3	29 7.8
NOT AT ALL IMPORTANT (1)	32 5.3	5 5.0	7 6.9	3 3.0	6 6.0	4 4.0	7 7.1	14 6.6	7 3.4	10 5.4	24 7.9	8 2.7	1 1.2	17 6.2	14 6.5	10 4.4	22 5.9
DON'T KNOW/NO ANSWER	3 0.5	*	2 2.0	*	1 1.0	*	*	2 0.9	*	1 0.5	2 0.7	1 0.3	*	*	2 0.9	*	3 0.8
MEAN	3.47	3.49	3.28	3.52	3.59	3.53	3.40	3.37	3.48	3.59	3.36	3.58	3.71	3.46	3.38	3.54	3.42
STANDARD DEVIATION	0.84	0.84	0.91	0.77	0.83	0.78	0.88	0.87	0.81	0.81	0.92	0.73	0.59	0.85	0.90	0.79	0.87
STANDARD ERROR	0.03	0.08	0.09	0.08	0.08	0.08	0.09	0.06	0.06	0.06	0.05	0.04	0.07	0.05	0.06	0.05	0.05

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A PERFUME AT $15 AN OUNCE OR HIGHER

THE PACKAGING

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 .100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	190 31.6	33 32.7	25 24.8	34 34.0	28 25.0	34 34.3	35 35.4	64 30.3	64 31.5	61 32.8	105 34.7	84 28.2	36 43.9	84 30.7	64 29.8	70 31.1	118 31.6
SOMEWHAT IMPORTANT	(3)	247 41.0	39 38.6	48 47.5	42 42.0	44 44.0	40 40.4	34 34.3	92 43.6	82 40.4	73 39.2	110 36.3	137 46.0	29 35.4	113 41.2	89 41.4	96 42.7	149 39.9
NOT VERY IMPORTANT	(2)	103 17.1	18 17.8	17 16.8	14 14.0	18 18.0	20 20.2	16 16.2	38 18.0	40 19.7	24 12.9	55 18.2	48 16.1	15 18.3	47 17.2	35 16.3	42 18.7	61 16.4
NOT AT ALL IMPORTANT	(1)	60 10.0	11 10.9	10 9.9	10 10.0	9 9.0	5 5.1	14 14.1	16 7.6	17 8.4	27 14.5	32 10.6	28 9.4	2 2.4	30 10.9	26 12.1	17 7.6	43 11.5
DON'T KNOW/NO ANSWER		2 0.3	*	1 1.0	*	1 1.0	*	*	1 0.5	*	1 0.5	1 0.3	1 0.3	*	*	1 0.5	*	2 0.5
MEAN		2.94	2.93	2.88	3.00	2.92	3.04	2.91	2.97	2.95	2.91	2.95	2.93	3.21	2.92	2.89	2.97	2.92
STANDARD DEVIATION		0.94	0.97	0.90	0.94	0.91	0.86	1.04	0.89	0.92	1.02	0.98	0.90	0.82	0.95	0.97	0.89	0.97
STANDARD ERROR		0.04	0.10	0.09	0.09	0.09	0.09	0.10	0.06	0.06	0.07	0.06	0.05	0.09	0.06	0.07	0.06	0.05

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A PERFUME AT $15 AN OUNCE OR HIGHER

THE STORE SELLING THE PRODUCT

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	154 25.6	22 21.8	16 15.8	28 28.0	29 29.0	32 32.3	27 27.3	35 16.6	53 26.1	65 34.9	84 27.7	69 23.2	33 40.2	63 23.0	48 22.3	70 31.1	82 22.0
SOMEWHAT IMPORTANT (3)	198 32.9	31 30.7	34 33.7	35 35.0	32 32.0	33 33.3	33 33.3	80 37.9	68 33.5	50 26.9	92 30.4	106 35.6	23 28.0	90 32.8	77 35.8	72 32.0	125 33.5
NOT VERY IMPORTANT (2)	157 26.1	29 28.7	26 25.7	21 21.0	25 25.0	30 30.3	25 25.3	63 29.9	58 28.6	35 18.8	69 22.8	88 29.5	17 20.7	73 26.6	56 26.0	55 24.4	101 27.1
NOT AT ALL IMPORTANT (1)	89 14.8	19 18.8	23 22.8	15 15.0	13 13.0	4 4.0	14 14.1	32 15.2	24 11.8	33 17.7	57 18.8	32 10.7	8 9.8	47 17.2	33 15.3	26 11.6	63 16.9
DON'T KNOW/NO ANSWER	4 0.7	*	2 2.0	1 1.0	1 1.0	*	*	1 0.5	*	3 1.6	1 0.3	3 1.0	1 1.2	1 0.4	1 0.5	2 0.9	2 0.5
MEAN	2.70	2.55	2.43	2.77	2.78	2.94	2.74	2.56	2.74	2.80	2.67	2.72	3.00	2.62	2.65	2.83	2.61
STANDARD DEVIATION	1.01	1.03	1.02	1.02	1.01	0.89	1.01	0.94	0.98	1.11	1.07	0.94	1.01	1.02	0.99	1.00	1.01
STANDARD ERROR	0.04	0.10	0.10	0.10	0.10	0.09	0.10	0.07	0.07	0.08	0.06	0.05	0.11	0.06	0.07	0.07	0.05

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A PERFUME AT $15 AN OUNCE OR HIGHER

THE PRICE

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602	101	101	100	100	99	99	211	203	186	303	298	82	274	215	225	373
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
VERY IMPORTANT (4)	382	70	54	65	69	66	56	126	128	127	172	209	61	169	131	152	226
	63.5	69.3	53.5	65.0	69.0	66.7	56.6	59.7	63.1	68.3	56.8	70.1	74.4	61.7	60.9	67.6	60.6
SOMEWHAT IMPORTANT (3)	144	16	33	26	23	21	25	52	56	36	81	63	15	68	55	44	100
	23.9	15.8	32.7	26.0	23.0	21.2	25.3	24.6	27.6	19.4	26.7	21.1	18.3	24.8	25.6	19.6	26.8
NOT VERY IMPORTANT (2)	47	11	7	7	2	9	11	21	14	12	26	21	4	21	20	18	29
	7.8	10.9	6.9	7.0	2.0	9.1	11.1	10.0	6.9	6.5	8.6	7.0	4.9	7.7	9.3	8.0	7.8
NOT AT ALL IMPORTANT (1)	25	4	5	2	5	2	7	9	5	10	20	5	2	13	9	9	16
	4.2	4.0	5.0	2.0	5.0	2.0	7.1	4.3	2.5	5.4	6.6	1.7	2.4	4.7	4.2	4.0	4.3
DON'T KNOW/NO ANSWER	4	*	2	*	1	1	*	3	*	1	4	*	*	3	*	2	2
	0.7		2.0		1.0	1.0		1.4		0.5	1.3			1.1		0.9	0.5
MEAN	3.48	3.50	3.37	3.54	3.58	3.54	3.31	3.42	3.51	3.51	3.35	3.60	3.65	3.45	3.43	3.52	3.44
STANDARD DEVIATION	0.81	0.84	0.82	0.71	0.77	0.74	0.93	0.84	0.73	0.84	0.90	0.69	0.69	0.83	0.83	0.81	0.81
STANDARD ERROR	0.03	0.08	0.08	0.07	0.08	0.08	0.09	0.06	0.05	0.06	0.05	0.04	0.08	0.05	0.06	0.05	0.04

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A PERFUME AT $15 AN OUNCE OR HIGHER

THE AVAILABILITY OF A PRODUCT WARRANTY

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	179 29.7	33 32.7	15 14.9	30 30.0	37 37.0	37 37.4	27 27.3	44 20.9	64 31.5	71 38.2	87 28.7	91 30.5	36 43.9	80 29.2	55 25.6	85 37.8	92 24.7
SOMEWHAT IMPORTANT	(3)	108 17.9	20 19.8	22 21.8	13 13.0	16 16.0	21 21.2	16 16.2	46 21.8	36 17.7	26 14.0	50 16.5	58 19.5	18 22.0	49 17.9	35 16.3	43 19.1	64 17.2
NOT VERY IMPORTANT	(2)	101 16.8	18 17.8	12 11.9	24 24.0	19 19.0	14 14.1	13 13.1	32 15.2	40 19.7	29 15.6	51 16.8	50 16.8	9 11.0	55 20.1	32 14.9	33 14.7	67 18.0
NOT AT ALL IMPORTANT	(1)	207 34.4	29 28.7	47 46.5	33 33.0	27 27.0	27 27.3	43 43.4	88 41.7	62 30.5	56 30.1	113 37.3	94 31.5	18 22.0	89 32.5	89 41.4	63 28.0	144 38.6
DON'T KNOW/NO ANSWER		7 1.2	1 1.0	5 5.0	*	1 1.0	*	*	1 0.5	1 0.5	4 2.2	2 0.7	5 1.7	1 1.2	1 0.4	4 1.9	1 0.4	6 1.6
MEAN		2.44	2.57	2.05	2.40	2.64	2.69	2.27	2.22	2.50	2.62	2.37	2.50	2.89	2.44	2.27	2.67	2.28
STANDARD DEVIATION		1.24	1.22	1.16	1.22	1.23	1.23	1.27	1.20	1.22	1.28	1.25	1.23	1.20	1.22	1.25	1.24	1.22
STANDARD ERROR		0.05	0.12	0.12	0.12	0.12	0.12	0.13	0.08	0.09	0.09	0.07	0.07	0.13	0.07	0.09	0.08	0.06

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A PERFUME AT $15 AN OUNCE OR HIGHER

THE BRAND NAME

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	329 54.7	52 51.5	52 51.5	57 57.0	57 57.0	52 52.5	58 58.6	106 50.2	109 53.7	112 60.2	155 51.2	173 58.1	53 64.6	148 54.0	112 52.1	130 57.8	196 52.5
SOMEWHAT IMPORTANT (3)	182 30.2	34 33.7	28 27.7	29 29.0	31 31.0	28 28.3	30 30.3	71 33.6	57 28.1	54 29.0	91 30.0	91 30.5	20 24.4	83 30.3	69 32.1	70 31.1	111 29.8
NOT VERY IMPORTANT (2)	56 9.3	9 8.9	16 15.8	9 9.0	5 5.0	12 12.1	5 5.1	20 9.5	23 11.3	13 7.0	34 11.2	22 7.4	8 9.8	23 8.4	21 9.8	15 6.7	41 11.0
NOT AT ALL IMPORTANT (1)	33 5.5	6 5.9	4 4.0	5 5.0	6 6.0	6 6.1	6 6.1	13 6.2	13 6.4	7 3.8	21 6.9	12 4.0	1 1.2	19 6.9	13 6.0	10 4.4	23 6.2
DON'T KNOW/NO ANSWER	2 0.3	*	1 1.0	*	1 1.0	*	*	1 0.5	1 0.5	*	2 0.7	*	*	1 0.4	*	*	2 0.5
MEAN	3.34	3.31	3.28	3.38	3.40	3.28	3.41	3.29	3.30	3.46	3.26	3.43	3.52	3.32	3.30	3.42	3.29
STANDARD DEVIATION	0.86	0.86	0.87	0.85	0.84	0.90	0.84	0.88	0.91	0.78	0.92	0.80	0.72	0.90	0.88	0.80	0.89
STANDARD ERROR	0.04	0.09	0.09	0.08	0.08	0.09	0.08	0.06	0.06	0.06	0.05	0.05	0.08	0.05	0.06	0.05	0.05

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A PERFUME AT $15 AN OUNCE OR HIGHER

THE APPEARANCE OF THE PRODUCT

		MARKET							AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	274 45.5	47 46.5	40 39.6	48 48.0	49 49.0	45 45.5	47 47.5	95 45.0	93 45.8	86 46.2	143 47.2	130 43.6	44 53.7	137 50.0	82 38.1	105 46.7	166 44.5
SOMEWHAT IMPORTANT (3)	207 34.4	35 34.7	39 38.6	31 31.0	38 38.0	35 35.4	29 29.3	79 37.4	64 31.5	64 34.4	92 30.4	115 38.6	25 30.5	90 32.8	82 38.1	79 35.1	127 34.0
NOT VERY IMPORTANT (2)	71 11.8	10 9.9	12 11.9	14 14.0	6 6.0	16 16.2	13 13.1	21 10.0	33 16.3	16 8.6	40 13.2	31 10.4	11 13.4	26 9.5	27 12.6	24 10.7	47 12.6
NOT AT ALL IMPORTANT (1)	48 8.0	9 8.9	9 8.9	10 10.0	6 6.0	3 3.0	10 10.1	15 7.1	12 5.9	20 10.8	26 8.6	22 7.4	2 2.4	21 7.7	23 10.7	16 7.1	32 8.6
DON'T KNOW/NO ANSWER	2 0.3	*	1 1.0	*	1 1.0	*	*	1 0.5	1 0.5	*	2 0.7	*	*	*	1 0.5	1 0.4	1 0.3
MEAN	3.18	3.19	3.10	3.11	3.31	3.23	3.14	3.21	3.18	3.16	3.17	3.18	3.35	3.25	3.04	3.22	3.15
STANDARD DEVIATION	0.93	0.94	0.93	0.99	0.84	0.83	1.00	0.89	0.91	0.98	0.96	0.90	0.80	0.92	0.97	0.90	0.95
STANDARD ERROR	0.04	0.09	0.09	0.1C	0.08	0.08	0.10	0.06	0.06	0.07	0.06	0.05	0.09	0.06	0.07	0.06	0.05

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A PERFUME AT $15 AN OUNCE OR HIGHER

THE COUNTRY IN WHICH THE PROD.WAS PRODUCED/MANUFACTURED

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	219 36.4	38 37.6	29 28.7	43 43.0	35 35.0	38 38.4	36 36.4	49 23.2	75 36.9	95 51.1	110 36.3	108 36.2	38 46.3	98 35.8	73 34.0	91 40.4	125 33.5
SOMEWHAT IMPORTANT	(3)	129 21.4	21 20.8	23 22.8	19 19.0	19 19.0	23 23.2	23 23.2	49 23.2	45 22.2	35 18.8	58 19.1	71 23.8	25 30.5	57 20.8	39 18.1	60 26.7	68 18.2
NOT VERY IMPORTANT	(2)	125 20.8	23 22.8	19 18.8	19 19.0	21 21.0	25 25.3	18 18.2	58 27.5	42 20.7	24 12.9	64 21.1	61 20.5	11 13.4	54 19.7	51 23.7	41 18.2	84 22.5
NOT AT ALL IMPORTANT	(1)	127 21.1	19 18.8	29 28.7	19 19.0	24 24.0	13 13.1	22 22.2	54 25.6	41 20.2	32 17.2	69 22.8	58 19.5	8 9.8	65 23.7	51 23.7	33 14.7	94 25.2
DON'T KNOW/NO ANSWER		2 0.3	*	1 1.0	*	1 1.0	*	*	1 0.5	*	*	2 0.7	*	*	*	1 0.5	*	2 0.5
MEAN		2.73	2.77	2.52	2.86	2.66	2.87	2.74	2.44	2.76	3.04	2.69	2.77	3.13	2.69	2.63	2.93	2.60
STANDARD DEVIATION		1.16	1.14	1.19	1.17	1.19	1.07	1.17	1.11	1.15	1.15	1.18	1.14	0.98	1.19	1.18	1.08	1.19
STANDARD ERROR		0.05	0.11	0.12	0.12	0.12	0.11	0.12	0.08	0.08	0.08	0.07	0.07	0.11	0.07	0.08	0.07	0.06

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED
PERFUME AT $15 AN OUNCE OR HIGHER

BROUGHT INTO U.S. BY TRADEMARK OWNER OR DOMESTIC DISTRIBUTOR

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	200 33.2	32 31.7	19 18.8	43 43.0	35 35.0	42 42.4	29 29.3	49 23.2	67 33.0	84 45.2	93 30.7	106 35.6	38 46.3	95 34.7	58 27.0	101 44.9	98 26.3
SOMEWHAT IMPORTANT	(3)	156 25.9	28 27.7	31 30.7	17 17.0	26 26.0	27 27.3	27 27.3	63 29.9	45 22.2	48 25.8	71 23.4	85 28.5	21 25.6	72 26.3	56 26.0	63 28.0	91 24.4
NOT VERY IMPORTANT	(2)	132 21.9	18 17.8	22 21.8	28 28.0	19 19.0	22 22.2	21 21.2	51 24.2	58 28.6	22 11.8	70 23.1	62 20.8	16 19.5	60 21.9	46 21.4	36 16.0	95 25.5
NOT AT ALL IMPORTANT	(1)	113 18.8	23 22.8	29 28.7	12 12.0	19 19.0	8 8.1	22 22.2	47 22.3	33 16.3	32 17.2	68 22.4	45 15.1	7 8.5	47 17.2	55 25.6	25 11.1	88 23.6
DON'T KNOW/NO ANSWER		1 0.2	*	*	*	1 1.0	*	*	1 0.5	*	*	1 0.3	*	*	*	*	*	1 0.3
MEAN		2.74	2.68	2.40	2.91	2.78	3.04	2.64	2.54	2.72	2.99	2.63	2.85	3.10	2.78	2.54	3.07	2.53
STANDARD DEVIATION		1.11	1.14	1.09	1.09	1.12	0.98	1.12	1.08	1.09	1.12	1.14	1.07	1.00	1.10	1.14	1.02	1.12
STANDARD ERROR		0.05	0.11	0.11	0.11	0.11	0.10	0.11	0.07	0.08	0.08	0.07	0.06	0.11	0.07	0.08	0.07	0.06

PRODUCT BUYING OPINION SURVEY

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED
PERFUME AT $15 AN OUNCE OR HIGHER

WARRANTY PROVIDED BY TRADEMARK OWNER OR DOMESTIC DISTRIBUTOR

			MARKET							AGE			GENDER		INCOME			EDUCATION	
		TOTAL	ATLANTA	BOSTON	CHICAGO	HOUSTON	LOS ANGELES	PHOENIX	18-34	35-49	50+	MALE	FEMALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	210 34.9	37 36.6	29 28.7	42 42.0	35 35.0	38 38.4	28 28.3	49 23.2	73 36.0	88 47.3	91 30.0	118 39.6	36 43.9	93 33.9	68 31.6	103 45.8	105 28.2
SOMEWHAT IMPORTANT	(3)	143 23.8	24 23.8	26 25.7	18 18.0	30 30.0	21 21.2	24 24.2	61 28.9	45 22.2	37 19.9	69 22.8	74 24.8	21 25.6	73 26.6	43 20.0	57 25.3	85 22.8
NOT VERY IMPORTANT	(2)	117 19.4	16 15.8	20 19.8	21 21.0	16 16.0	26 26.3	17 17.2	46 21.8	42 20.7	28 15.1	59 19.5	58 19.5	15 18.3	49 17.9	45 20.9	35 15.6	81 21.7
NOT AT ALL IMPORTANT	(1)	129 21.4	23 22.8	26 25.7	19 19.0	18 18.0	13 13.1	30 30.3	54 25.6	43 21.2	31 16.7	82 27.1	47 15.8	9 11.0	59 21.5	58 27.0	29 12.9	100 26.8
DON'T KNOW/NO ANSWER		3 0.5	1 1.0	*	*	1 1.0	1 1.0	*	1 0.5	*	2 1.1	2 0.7	1 0.3	1 1.2	*	1 0.5	1 0.4	2 0.5
MEAN		2.72	2.75	2.57	2.83	2.83	2.86	2.51	2.50	2.73	2.99	2.56	2.89	3.04	2.73	2.57	3.04	2.53
STANDARD DEVIATION		1.15	1.18	1.15	1.17	1.10	1.08	1.19	1.11	1.16	1.14	1.18	1.10	1.04	1.14	1.19	1.06	1.16
STANDARD ERROR		0.05	0.12	0.12	0.12	0.11	0.11	0.12	0.08	0.08	0.08	0.07	0.06	0.12	0.07	0.08	0.07	0.06

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED PERFUME AT $15 AN OUNCE OR HIGHER

AUTHENTIC OR AN IMITATION OR A COPY

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602	101	101	100	100	99	99	211	203	186	303	298	82	274	215	225	373
		100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
VERY IMPORTANT	(4)	415	73	72	69	69	62	68	143	129	142	198	216	59	187	149	167	244
		68.9	72.3	71.3	69.0	69.0	62.6	68.7	67.8	63.5	76.3	65.3	72.5	72.0	68.2	69.3	74.2	65.4
SOMEWHAT IMPORTANT	(3)	90	13	16	13	14	21	13	31	35	24	46	44	15	41	29	31	59
		15.0	12.9	15.8	13.0	14.0	21.2	13.1	14.7	17.2	12.9	15.2	14.8	18.3	15.0	13.5	13.8	15.8
NOT VERY IMPORTANT	(2)	52	7	9	10	7	10	9	22	22	8	30	22	6	23	20	16	36
		8.6	6.9	8.9	10.0	7.0	10.1	9.1	10.4	10.8	4.3	9.9	7.4	7.3	8.4	9.3	7.1	9.7
NOT AT ALL IMPORTANT	(1)	44	8	4	8	9	6	9	14	17	12	28	16	2	23	17	11	33
		7.3	7.9	4.0	8.0	9.0	6.1	9.1	6.6	8.4	6.5	9.2	5.4	2.4	8.4	7.9	4.9	8.8
DON'T KNOW/NO ANSWER		1	*	*	*	1	*	*	1	*	*	1	*	*	*	*	*	1
		0.2				1.0			0.5			0.3						0.3
MEAN		3.46	3.50	3.54	3.43	3.44	3.40	3.41	3.44	3.36	3.59	3.37	3.54	3.60	3.43	3.44	3.57	3.38
STANDARD DEVIATION		0.93	0.83	0.81	0.96	0.97	0.90	0.98	0.93	0.97	0.85	0.99	0.85	0.73	0.96	0.95	0.82	0.98
STANDARD ERROR		0.04	0.09	0.08	0.10	0.10	0.09	0.10	0.06	0.07	0.06	0.06	0.05	0.08	0.06	0.07	0.06	0.05

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A AUTOMOBILE TIRE AT $50 OR HIGHER?

THE VALUE FOR THE MONEY

		MARKET							AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT- LANTA	BOS- TON	CHIC- AGO	HOU- STON	LOS ANG- ELES	PHOE -NIX	18- 34	35- 49	50+	MALE	FE- MALE	UNDER $15M	$15M- 34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	523 86.9	97 96.0	81 80.2	84 84.0	87 87.0	82 82.8	90 90.9	172 81.5	183 90.1	167 89.8	258 85.1	264 88.6	65 79.3	244 89.1	185 86.0	196 87.1	324 86.9
SOMEWHAT IMPORTANT	(3)	59 9.8	4 4.0	17 16.8	12 12.0	11 11.0	11 11.1	4 4.0	30 14.2	15 7.4	13 7.0	38 12.5	21 7.0	9 11.0	21 7.7	27 12.6	18 8.0	40 10.7
NOT VERY IMPORTANT	(2)	12 2.0	*	3 3.0	3 3.0	1 1.0	3 3.0	2 2.0	5 2.4	4 2.0	3 1.6	5 1.7	7 2.3	4 4.9	5 1.8	3 1.4	5 2.2	7 1.9
NOT AT ALL IMPORTANT	(1)	7 1.2	*	*	1 1.0	1 1.0	2 2.0	3 3.0	3 1.4	1 0.5	3 1.6	2 0.7	5 1.7	4 4.9	3 1.1	*	6 2.7	1 0.3
DON'T KNOW/NO ANSWER		1 0.2	*	*	*	*	1 1.0	*	1 0.5	*	*	*	1 0.3	*	1 0.4	*	*	1 0.3
MEAN		3.83	3.96	3.77	3.79	3.84	3.77	3.83	3.77	3.87	3.85	3.82	3.83	3.65	3.85	3.85	3.80	3.85
STANDARD DEVIATION		0.50	0.20	0.49	0.53	0.46	0.60	0.60	0.56	0.43	0.51	0.47	0.54	0.79	0.48	0.40	0.61	0.43
STANDARD ERROR		0.02	0.02	0.05	0.05	0.05	0.06	0.06	0.04	0.03	0.04	0.03	0.03	0.09	0.03	0.03	0.04	0.02

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A AUTOMOBILE TIRE AT $50 OR HIGHER

THE PACKAGING

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	87 14.5	16 15.8	9 8.9	14 14.0	21 21.0	19 19.2	8 8.1	23 10.9	37 18.2	27 14.5	35 11.6	51 17.1	20 24.4	35 12.8	29 13.5	37 16.4	49 13.1
SOMEWHAT IMPORTANT	(3)	107 17.8	17 16.8	12 11.9	17 17.0	19 19.0	24 24.2	18 18.2	49 23.2	26 12.8	32 17.2	50 16.5	57 19.1	14 17.1	59 21.5	30 14.0	57 25.3	50 13.4
NOT VERY IMPORTANT	(2)	150 24.9	23 22.8	29 28.7	28 28.0	20 20.0	26 26.3	23 23.2	59 28.0	49 24.1	42 22.6	75 24.8	75 25.2	19 23.2	67 24.5	55 25.6	56 24.9	93 24.9
NOT AT ALL IMPORTANT	(1)	257 42.7	45 44.6	51 50.5	41 41.0	40 40.0	29 29.3	50 50.5	79 37.4	91 44.8	85 45.7	143 47.2	114 38.3	29 35.4	112 40.9	101 47.0	75 33.3	180 48.3
DON'T KNOW/NO ANSWER		1 0.2	*	*	*	*	1 1.0	*	1 0.5	*	*	*	1 0.3	*	1 0.4	*	*	1 0.3
MEAN		2.04	2.04	1.79	2.04	2.21	2.34	1.84	2.08	2.04	2.01	1.92	2.15	2.30	2.06	1.94	2.25	1.91
STANDARD DEVIATION		1.09	1.12	0.97	1.07	1.18	1.10	0.99	1.02	1.14	1.10	1.05	1.11	1.19	1.07	1.07	1.09	1.07
STANDARD ERROR		0.04	0.11	0.10	0.11	0.12	0.11	0.10	0.07	0.08	0.08	0.06	0.06	0.13	0.06	0.07	0.07	0.06

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A AUTOMOBILE TIRE AT $50 OR HIGHER

THE STORE SELLING THE PRODUCT

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	226 37.5	43 42.6	26 25.7	35 35.0	37 37.0	47 47.5	37 37.4	60 28.4	73 36.0	92 49.5	102 33.7	123 41.3	40 48.8	97 35.4	76 35.3	104 46.2	120 32.2
SOMEWHAT IMPORTANT (3)	183 30.4	26 25.7	32 31.7	34 34.0	33 33.0	29 29.3	29 29.3	77 36.5	63 31.0	43 23.1	91 30.0	92 30.9	17 20.7	92 33.6	67 31.2	65 28.9	118 31.6
NOT VERY IMPORTANT (2)	108 17.9	14 13.9	24 23.8	17 17.0	18 18.0	18 18.2	16 16.2	46 21.8	35 17.2	27 14.5	57 18.8	51 17.1	11 13.4	47 17.2	42 19.5	32 14.2	74 19.8
NOT AT ALL IMPORTANT (1)	83 13.8	18 17.8	18 17.8	14 14.0	11 11.0	5 5.1	17 17.2	28 13.3	32 15.8	23 12.4	53 17.5	30 10.1	14 17.1	37 13.5	29 13.5	23 10.2	60 16.1
DON'T KNOW/NO ANSWER	2 0.3	*	1 1.0	*	1 1.0	*	*	*	*	1 0.5	*	2 0.7	*	1 0.4	1 0.5	1 0.4	1 0.3
MEAN	2.92	2.93	2.66	2.90	2.97	3.19	2.87	2.80	2.87	3.10	2.80	3.04	3.01	2.91	2.89	3.12	2.80
STANDARD DEVIATION	1.05	1.13	1.05	1.03	1.00	0.91	1.10	1.00	1.07	1.06	1.09	1.00	1.14	1.03	1.04	1.00	1.06
STANDARD ERROR	0.04	0.11	0.11	0.10	0.10	0.09	0.11	0.07	0.08	0.08	0.06	0.06	0.13	0.06	0.07	0.07	0.06

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A AUTOMOBILE TIRE AT $50 OR HIGHER

THE PRICE

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	479 79.6	83 82.2	77 76.2	75 75.0	80 80.0	82 82.8	80 80.8	156 73.9	171 84.2	151 81.2	227 74.9	251 84.2	68 82.9	219 79.9	168 78.1	181 80.4	294 78.8
SOMEWHAT IMPORTANT	(3)	96 15.9	14 13.9	20 19.8	21 21.0	16 16.0	12 12.1	13 13.1	43 20.4	24 11.8	28 15.1	59 19.5	37 12,4	9 11.0	42 15.3	41 19.1	33 14.7	63 16.9
NOT VERY IMPORTANT	(2)	18 3.0	2 2.0	2 2.0	4 4.0	4 4.0	3 3.0	3 3.0	9 4.3	6 3.0	3 1.6	11 3.6	7 2.3	1 1.2	9 3.3	6 2.8	6 2.7	12 3.2
NOT AT ALL IMPORTANT	(1)	6 1.0	2 2.0	*	*	*	1 1.0	3 3.0	3 1.4	1 0.5	2 1.1	3 1.0	3 1.0	4 4:9	1 0.4	*	4 1.8	2 0.5
DON'T KNOW/NO ANSWER		3 0.5	*	2 2.0	*	*	1 1.0	*	*	1 0.5	2 1.1	3 1.0	*	*	3 1.1	*	1 0.4	2 0.5
MEAN		3.75	3.76	3.76	3.71	3.76	3.79	3.72	3.67	3.81	3.78	3.70	3.80	3.72	3.77	3.75	3.75	3.75
STANDARD DEVIATION		0.55	0.58	0.47	0.53	0.51	0.54	0.67	0.63	0.49	0.52	0.59	0.52	0.72	0.52	0.49	0.59	0.53
STANDARD ERROR		0.02	0.06	0.05	0.05	0.05	0.05	0.07	0.04	0,03	0.04	0.03	0.03	0.08	0.03	0.03	0.04	0.03

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A
AUTOMOBILE TIRE AT $50 OR HIGHER

THE AVAILABILITY OF A PRODUCT WARRANTY

		MARKET							AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	511 84.9	87 86.1	84 83.2	81 81.0	87 87.0	85 85.9	86 86.9	168 79.6	179 88.2	162 87.1	249 82.2	261 87.6	72 87.8	231 84.3	183 85.1	191 84.9	316 84.7
SOMEWHAT IMPORTANT	(3)	71 11.8	13 12.9	11 10.9	16 16.0	11 11.0	12 12.1	7 7.1	34 16.1	20 9.9	17 9.1	43 14.2	28 9.4	5 6.1	35 12.8	26 12.1	28 12.4	43 11.5
NOT VERY IMPORTANT	(2)	10 1.7	*	5 5.0	2 2.0	*	1 1.0	2 2.0	4 1.9	2 1.0	4 2.2	5 1.7	5 1.7	3 3.7	3 1.1	4 1.9	2 0.9	8 2.1
NOT AT ALL IMPORTANT	(1)	10 1.7	1 1.0	1 1.0	1 1.0	2 2.0	1 1.0	4 4.0	5 2.4	2 1.0	3 1.6	6 2.0	4 1.3	2 2.4	5 1.8	2 0.9	4 1.8	6 1.6
DON'T KNOW/NO ANSWER		*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN		3.80	3.84	3.76	3.77	3.83	3.83	3.77	3.73	3.85	3.82	3.77	3.83	3.79	3.80	3.81	3.80	3.79
STANDARD DEVIATION		0.54	0.44	0.58	0.53	0.51	0.47	0.68	0.61	0.45	0.54	0.58	0.50	0.62	0.54	0.49	0.53	0.55
STANDARD ERROR		0.02	0.04	0.06	0.05	0.05	0.05	0.07	0.04	0.03	0.04	0.03	0.03	0.07	0.03	0.03	0.04	0.03

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A AUTOMOBILE TIRE AT $50 OR HIGHER

THE BRAND NAME

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	350 58.1	60 59.4	48 47.5	64 64.0	71 71.0	55 55.6	52 52.5	111 52.6	110 54.2	128 68.8	168 55.4	181 60.7	50 61.0	161 58.8	120 55.8	140 62.2	207 55.5
SOMEWHAT IMPORTANT	(3)	184 30.6	32 31.7	42 41.6	25 25.0	22 22.0	30 30.3	31 31.3	74 35.1	65 32.0	44 23.7	91 30.0	93 31.2	19 23.2	83 30.3	74 34.4	67 29.8	116 31.1
NOT VERY IMPORTANT	(2)	45 7.5	4 4.0	8 7.9	7 7.0	4 4.0	10 10.1	12 12.1	15 7.1	21 10.3	9 4.8	28 9.2	17 5.7	7 8.5	21 7.7	14 6.5	13 5.8	32 8.6
NOT AT ALL IMPORTANT	(1)	22 3.7	5 5.0	2 2.0	4 4.0	3 3.0	4 4.0	4 4.0	11 5.2	6 3.0	5 2.7	15 5.0	7 2.3	6 7.3	8 2.9	7 3.3	5 2.2	17 4.6
DON'T KNOW/NO ANSWER		1 0.2	*	1 1.0	*	*	*	*	*	1 0.5	*	1 0.3	*	*	1 0.4	*	*	1 0.3
MEAN		3.43	3.46	3.36	3.49	3.61	3.37	3.32	3.35	3.38	3.59	3.36	3.50	3.38	3.45	3.43	3.52	3.38
STANDARD DEVIATION		0.78	0.79	0.71	0.79	0.71	0.82	0.84	0.83	0.79	0.71	0.85	0.71	0.92	0.76	0.76	0.71	0.83
STANDARD ERROR		0.03	0.08	0.07	0.08	0.07	0.08	0.08	0.06	0.06	0.05	0.05	0.04	0.10	0.05	0.05	0.05	0.04

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A AUTOMOBILE TIRE AT $50 OR HIGHER

THE APPEARANCE OF THE PRODUCT

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	ATLANTA	BOSTON	CHICAGO	HOUSTON	LOS ANGELES	PHOENIX	18-34	35-49	50+	MALE	FEMALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	274 45.5	49 48.5	35 34.7	48 48.0	63 63.0	45 45.5	34 34.3	94 44.5	96 47.3	84 45.2	129 42.6	144 48.3	44 53.7	129 47.1	86 40.0	118 52.4	154 41.3
SOMEWHAT IMPORTANT (3)	193 32.1	33 32.7	34 33.7	25 25.0	24 24.0	35 35.4	42 42.4	73 34.6	68 33.5	52 28.0	103 34.0	90 30.2	21 25.6	90 32.8	75 34.9	69 30.7	122 32.7
NOT VERY IMPORTANT (2)	77 12.8	9 8.9	17 16.8	14 14.0	9 9.0	15 15.2	12 12.1	28 13.3	22 10.8	26 14.0	43 14.2	34 11.4	10 12.2	34 12.4	27 12.6	24 10.7	53 14.2
NOT AT ALL IMPORTANT (1)	56 9.3	10 9.9	14 13.9	13 13.0	4 4.0	3 3.0	11 11.1	15 7.1	16 7.9	24 12.9	27 8.9	29 9.7	6 7.3	21 7.7	26 12.1	12 5.3	44 11.8
DON'T KNOW/NO ANSWER	2 0.3	*	1 1.0	*	*	1 1.0	*	1 0.5	1 0.5	*	1 0.3	1 0.3	1 1.2	*	1 0.5	2 0.9	*
MEAN	3.14	3.20	2.90	3.08	3.46	3.24	3.00	3.17	3.21	3.05	3.11	3.18	3.27	3.19	3.03	3.31	3.03
STANDARD DEVIATION	0.97	0.96	1.03	1.06	0.82	0.82	0.95	0.92	0.93	1.05	0.96	0.98	0.94	0.93	1.01	0.87	1.01
STANDARD ERROR	0.04	0.10	0.10	0.11	0.08	0.08	0.10	0.06	0.07	0.08	0.06	0.06	0.11	0.06	0.07	0.06	0.05

PRODUCT BUYING OPINION SURVEY

Q.1 IMPORTANCE OF SELECTED ATTRIBUTES WHEN CHOOSING A AUTOMOBILE TIRE AT $50 OR HIGHER

THE COUNTRY IN WHICH THE PROD.WAS PRODUCED/MANUFACTURED

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	268 44.5	51 50.5	38 37.6	56 56.0	39 39.0	41 41.4	43 43.4	60 28.4	96 47.3	112 60.2	137 45.2	130 43.6	42 51.2	121 44.2	91 42.3	113 50.2	152 40.8
SOMEWHAT IMPORTANT	(3)	137 22.8	10 9.9	21 20.8	23 23.0	28 28.0	30 30.3	25 25.3	60 28.4	42 20.7	34 18.3	63 20.8	74 24.8	17 20.7	66 24.1	50 23.3	54 24.0	82 22.0
NOT VERY IMPORTANT	(2)	108 17.9	24 23.8	21 20.8	12 12.0	20 20.0	16 16.2	14 14.1	50 23.7	37 18.2	21 11.3	56 18.5	52 17.4	13 15.9	50 18.2	37 17.2	34 15.1	74 19.8
NOT AT ALL IMPORTANT	(1)	89 14.8	16 15.8	21 20.8	9 9.0	13 13.0	12 12.1	17 17.2	41 19.4	28 13.8	19 10.2	47 15.5	42 14.1	10 12.2	37 13.5	37 17.2	24 10.7	65 17.4
DON'T KNOW/NO ANSWER		*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN		2.97	2.95	2.75	3.26	2.93	3.01	2.95	2.66	3.01	3.28	2.96	2.98	3.11	2.99	2.91	3.14	2.86
STANDARD DEVIATION		1.10	1.17	1.16	0.99	1.05	1.03	1.12	1.09	1.10	1.02	1.12	1.08	1.07	1.08	1.13	1.03	1.13
STANDARD ERROR		0.04	0.12	0.12	0.10	0.11	0.10	0.11	0.08	0.08	0.08	0.06	0.06	0.12	0.07	0.08	0.07	0.06

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED
AUTOMOBILE TIRE AT $50 OR HIGHER

BROUGHT INTO U.S. BY TRADEMARK OWNER OR DOMESTIC DISTRIBUTOR

			MARKET						AGE			GENDER		INCOME			EDUCATION	
		TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE		602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT	(4)	278 46.2	49 48.5	36 35.6	57 57.0	41 41.0	52 52.5	43 43.4	68 32.2	95 46.8	114 61.3	126 41.6	151 50.7	48 58.5	128 46.7	91 42.3	127 56.4	149 39.9
SOMEWHAT IMPORTANT	(3)	149 24.8	18 17.8	28 27.7	24 24.0	23 23.0	28 28.3	28 28.3	70 33.2	41 20.2	38 20.4	84 27.7	65 21.8	17 20.7	71 25.9	53 24.7	56 24.9	91 24.4
NOT VERY IMPORTANT	(2)	100 16.6	15 14.9	22 21.8	13 13.0	18 18.0	17 17.2	14 14.1	44 20.9	44 21.7	12 6.5	49 16.2	51 17.1	11 13.4	41 15.0	38 17.7	23 10.2	77 20.6
NOT AT ALL IMPORTANT	(1)	75 12.5	19 18.8	15 14.9	6 6.0	18 18.0	2 2.0	14 14.1	29 13.7	23 11.3	22 11.8	44 14.5	31 10.4	6 7.3	34 12.4	33 15.3	19 8.4	56 15.0
DON'T KNOW/NO ANSWER		*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN		3.05	2.96	2.84	3.32	2.87	3.31	3.01	2.84	3.02	3.31	2.96	3.13	3.30	3.07	2.94	3.29	2.89
STANDARD DEVIATION		1.06	1.18	1.07	0.92	1.14	0.82	1.07	1.03	1.07	1.03	1.08	1.04	0.96	1.05	1.10	0.96	1.09
STANDARD ERROR		0.04	0.12	0.11	0.09	0.11	0.08	0.11	0.07	0.08	0.08	0.06	0.06	0.11	0.06	0.08	0.06	0.06

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED AUTOMOBILE TIRE AT $50 OR HIGHER

WARRANTY PROVIDED BY TRADEMARK OWNER OR DOMESTIC DISTRIBUTOR

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	406 67.4	76 75.2	64 63.4	71 71.0	59 59.0	66 66.7	69 69.7	123 58.3	140 69.0	141 75.8	203 67.0	202 67.8	62 75.6	181 66.1	137 63.7	169 75.1	234 62.7
SOMEWHAT IMPORTANT (3)	106 17.6	14 13.9	24 23.8	15 15.0	20 20.0	18 18.2	14 14.1	50 23.7	32 15.8	24 12.9	52 17.2	54 18.1	9 11.0	50 18.2	43 20.0	34 15.1	71 19.0
NOT VERY IMPORTANT (2)	47 7.8	3 3.0	4 4.0	13 13.0	9 9.0	11 11.1	6 6.1	20 9.5	18 8.9	9 4.8	23 7.6	24 8.1	4 4.9	26 9.5	16 7.4	8 3.6	39 10.5
NOT AT ALL IMPORTANT (1)	43 7.1	8 7.9	9 8.9	1 1.0	12 12.0	3 3.0	10 10.1	18 8.5	13 6.4	12 6.5	25 8.3	18 6.0	7 8.5	17 6.2	19 8.8	14 6.2	29 7.8
DON'T KNOW/NO ANSWER	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN	3.45	3.56	3.42	3.56	3.26	3.49	3.43	3.32	3.47	3.58	3.43	3.48	3.54	3.44	3.39	3.59	3.37
STANDARD DEVIATION	0.91	0.88	0.93	0.75	1.05	0.81	0.99	0.96	0.90	0.85	0.94	0.88	0.93	0.90	0.96	0.83	0.95
STANDARD ERROR	0.04	0.09	0.09	0.08	0.11	0.08	0.10	0.07	0.06	0.06	0.05	0.05	0.10	0.05	0.07	0.06	0.05

Q.2 IMPORTANCE OF SELECTED ATTRIBUTES IF ITEM WERE IMPORTED AUTOMOBILE TIRE AT $50 OR HIGHER

AUTHENTIC OR AN IMITATION OR A COPY

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT- LANTA	BOS- TON	CHIC- AGO	HOU- STON	LOS ANG- ELES	PHOE -NIX	18- 34	35- 49	50+	MALE	FE- MALE	UNDER $15M	$15M- 34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
VERY IMPORTANT (4)	476 79.1	81 80.2	82 81.2	83 83.0	80 80.0	74 74.7	75 75.8	148 70.1	166 81.8	161 86.6	234 77.2	241 80.9	64 78.0	211 77.0	176 81.9	185 82.2	287 76.9
SOMEWHAT IMPORTANT (3)	69 11.5	8 7.9	14 13.9	12 12.0	8 8.0	13 13.1	13 13.1	36 17.1	19 9.4	13 7.0	44 14.5	25 8.4	8 9.8	36 13.1	20 9.3	22 9.8	47 12.6
NOT VERY IMPORTANT (2)	34 5.6	5 5.0	4 4.0	3 3.0	6 6.0	9 9.1	7 7.1	16 7.6	11 5.4	7 3.8	17 5.6	17 5.7	4 4.9	17 6.2	13 6.0	6 2.7	28 7.5
NOT AT ALL IMPORTANT (1)	23 3.8	7 6.9	1 1.0	2 2.0	6 6.0	3 3.0	4 4.0	11 5.2	7 3.4	5 2.7	8 2.6	15 5.0	6 7.3	10 3.6	6 2.8	12 5.3	11 2.9
DON'T KNOW/NO ANSWER	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
MEAN	3.66	3.61	3.75	3.76	3.62	3.60	3.61	3.52	3.69	3.77	3.66	3.65	3.59	3.64	3.70	3.69	3.64
STANDARD DEVIATION	0.75	0.87	0.57	0.60	0.85	0.78	0.79	0.84	0.73	0.64	0.70	0.80	0.88	0.76	0.71	0.77	0.75
STANDARD ERROR	0.03	0.09	0.06	0.06	0.09	0.08	0.08	0.06	0.05	0.05	0.04	0.05	0.10	0.05	0.05	0.05	0.04

Q.3 PRICE/WARRANTY PREFERENCE

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
TO PAY $100 FOR THE ITEM WITH A WARRANTY FROM A TRADEMARK OWNER	193 32.1	44 43.6	20 19.8	34 34.0	37 37.0	26 26.3	32 32.3	68 32.2	64 31.5	60 32.3	105 34.7	88 29.5	26 31.7	91 33.2	67 31.2	84 37.3	109 29.2
TO PAY $75 FOR THE SAME ITEM WITH AN EQUIVALENT WARRANTY FROM A DOMESTIC DISTRIBUTOR,RETAIL STORE OR RETAIL CHAIN	404 67.1	57 56.4	77 76.2	66 66.0	63 63.0	73 73.7	66 66.7	143 67.8	138 68.0	122 65.6	196 64.7	207 69.5	55 67.1	180 65.7	147 68.4	139 61.8	261 70.0
DON'T KNOW/NO ANSWER	5 0.8	•	4 4.0	•	•	•	1 1.0	•	1 0.5	4 2.2	2 0.7	3 1.0	1 1.2	3 1.1	1 0.5	2 0.9	3 0.8

Q.4 WHETHER IN FAVOR OF PRESENT BLUE LAWS

AMONG HOUSTON RESPONDENTS ONLY

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	100 100.0	*	*	*	100 100.0	*	*	34 100.0	34 100.0	32 100.0	50 100.0	50 100.0	6 100.0	55 100.0	34 100.0	35 100.0	65 100.0
PREFER PRESENT BLUE LAWS SITUATION	24 24.0	*	*	*	24 24.0	*	*	8 23.5	6 17.6	10 31.3	12 24.0	12 24.0	1 16.7	14 25.5	8 23.5	10 28.6	14 21.5
WOULD LIKE TO SEE BLUE LAWS SITUATION CHANGED	72 72.0	*	*	*	72 72.0	*	*	25 73.5	26 76.5	21 65.6	37 74.0	35 70.0	4 66.7	39 70.9	25 73.5	24 68.6	48 73.8
NO ANSWER	4 4.0	*	*	*	4 4.0	*	*	1 2.9	2 5.9	1 3.1	1 2.0	3 6.0	1 16.7	2 3.6	1 2.9	1 2.9	3 4.6

Q.A & B EMPLOYMENT STATUS

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602	101	101	100	100	99	99	211	203	186	303	298	82	274	215	225	373
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
EMPLOYED	392	62	69	62	72	62	64	155	163	72	222	169	38	178	160	124	265
	65.1	61.4	68.3	62.0	72.0	62.6	64.6	73.5	80.3	38.7	73.3	56.7	46.3	65.0	74.4	55.1	71.0
FULL-TIME	315	53	53	47	65	47	49	116	144	53	191	124	24	150	130	97	217
	52.3	52.5	52.5	47.0	65.0	47.5	49.5	55.0	70.9	28.5	63.0	41.6	29.3	54.7	60.5	43.1	58.2
PART-TIME	75	9	15	15	7	14	15	38	18	19	30	44	14	26	30	27	47
	12.5	8.9	14.9	15.0	7.0	14.1	15.2	18.0	8.9	10.2	9.9	14.8	17.1	9.5	14.0	12.0	12.6
NO ANSWER	2	*	1	*	*	1	*	1	1	*	1	1	*	2	*	*	1
	0.3		1.0			1.0		0.5	0.5		0.3	0.3		0.7			0.3
NOT EMPLOYED	208	39	31	38	27	37	35	56	39	113	79	129	44	94	55	101	106
	34.6	38.6	30.7	38.0	27.0	37.4	35.4	26.5	19.2	60.8	26.1	43.3	53.7	34.3	25.6	44.9	28.4
NO ANSWER	2	*	1	*	1	*	*	*	1	1	2	*	*	2	*	*	2
	0.3		1.0		1.0				0.5	0.5	0.7			0.7			0.5

Q.C MARITAL STATUS

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
MARRIED	350 58.1	73 72.3	46 45.5	68 68.0	57 57.0	49 49.5	56 56.6	64 30.3	140 69.0	144 77.4	164 54.1	186 62.4	34 41.5	149 54.4	147 68.4	144 64.0	204 54.7
SINGLE	195 32.4	23 22.8	47 46.5	24 24.0	36 36.0	38 38.4	26 26.3	138 65.4	38 18.7	19 10.2	115 38.0	79 26.5	38 46.3	93 33.9	56 26.0	61 27.1	132 35.4
WIDOWED	12 2.0	4 4.0	1 1.0	2 2.0	*	2 2.0	3 3.0	1 0.5	2 1.0	9 4.8	5 1.7	7 2.3	4 4.9	4 1.5	4 1.9	3 1.3	9 2.4
DIVORCED/SEPARATED	43 7.1	1 1.0	6 5.9	6 6.0	7 7.0	10 10.1	13 13.1	8 3.8	23 11.3	12 6.5	18 5.9	25 8.4	6 7.3	27 9.9	8 3.7	16 7.1	27 7.2
DON'T KNOW/NO ANSWER	2 0.3	*	1 1.0	*	*	*	1 1.0	*	*	2 1.1	1 0.3	1 0.3	*	1 0.4	*	1 0.4	1 0.3

Q.D & E EMPLOYMENT STATUS OF SPOUSE

AMONG THOSE MARRIED

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	350 100.0	73 100.0	46 100.0	68 100.0	57 100.0	49 100.0	56 100.0	64 100.0	140 100.0	144 100.0	164 100.0	186 100.0	34 100.0	149 100.0	147 100.0	144 100.0	204 100.0
EMPLOYED	227 64.9	51 69.9	34 73.9	41 60.3	37 64.9	32 65.3	31 55.4	54 84.4	105 75.0	66 45.8	71 43.3	156 83.9	14 41.2	88 59.1	112 76.2	82 56.9	144 70.6
FULL-TIME	207 59.1	49 67.1	26 56.5	40 58.8	34 59.6	29 59.2	28 50.0	51 79.7	93 66.4	62 43.1	56 34.1	151 81.2	11 32.4	81 54.4	102 69.4	78 54.2	128 62.7
PART-TIME	18 5.1	1 1.4	8 17.4	1 1.5	3 5.3	2 4.1	3 5.4	3 4.7	10 7.1	4 2.8	14 8.5	4 2.2	3 8.8	6 4.0	9 6.1	4 2.8	14 6.9
NO ANSWER	2 0.6	1 1.4	*	*	*	1 2.0	*	*	2 1.4	*	1 0.6	1 0.5	*	1 0.7	1 0.7	*	2 1.0
NOT EMPLOYED	120 34.3	21 28.8	12 26.1	27 39.7	19 33.3	17 34.7	24 42.9	9 14.1	34 24.3	77 53.5	91 55.5	29 15.6	19 55.9	60 40.3	34 23.1	61 42.4	58 28.4
NO ANSWER	3 0.9	1 1.4	*	*	1 1.8	*	1 1.8	1 1.6	1 0.7	1 0.7	2 1.2	1 0.5	1 2.9	1 0.7	1 0.7	1 0.7	2 1.0

Q.F EDUCATION

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
LESS THAN HIGH SCHOOL	37 6.1	9 8.9	2 2.0	7 7.0	2 2.0	13 13.1	4 4.0	6 2.8	10 4.9	21 11.3	22 7.3	15 5.0	12 14.6	15 5.5	9 4.2	37 16.4	*
HIGH SCHOOL GRADUATE	188 31.2	37 36.6	21 20.8	36 36.0	33 33.0	31 31.3	30 30.3	67 31.8	43 21.2	78 41.9	86 28.4	102 34.2	36 43.9	102 37.2	38 17.7	188 83.6	*
SOME COLLEGE	205 34.1	28 27.7	31 30.7	36 36.0	37 37.0	33 33.3	39 39.4	90 42.7	71 35.0	44 23.7	95 31.4	109 36.6	26 31.7	93 33.9	80 37.2	*	205 55.0
COLLEGE GRADUATE	117 19.4	16 15.8	26 25.7	12 12.0	25 25.0	19 19.2	18 18.2	39 18.5	48 23.6	30 16.1	71 23.4	46 15.4	7 8.5	42 15.3	59 27.4	*	117 31.4
POST COLLEGE	51 8.5	11 10.9	19 18.8	8 8.0	3 3.0	2 2.0	8 8.1	9 4.3	28 13.8	12 6.5	28 9.2	23 7.7	1 1.2	20 7.3	28 13.0	*	51 13.7
DON'T KNOW/NO ANSWER	4 0.7	*	2 2.0	1 1.0	*	1 1.0	*	*	3 1.5	1 0.5	1 0.3	3 1.0	*	2 0.7	1 0.5	*	*

Q.9 TOTAL NUMBER OF HOUSEHOLD MEMBERS

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
1	83 13.8	7 6.9	17 16.8	10 10.0	20 20.0	14 14.1	15 15.2	35 16.6	25 12.3	23 12.4	52 17.2	31 10.4	23 28.0	45 16.4	11 5.1	23 10.2	60 16.1
2	198 32.9	33 32.7	38 37.6	29 29.0	44 44.0	18 18.2	34 34.3	51 24.2	42 20.7	104 55.9	104 34.3	93 31.2	31 37.8	81 29.6	74 34.4	82 36.4	115 30.8
3	129 21.4	22 21.8	15 14.9	28 28.0	22 22.0	21 21.2	21 21.2	55 26.1	43 21.2	30 16.1	61 20.1	68 22.8	9 11.0	68 24.8	48 22.3	45 20.0	83 22.3
4	105 17.4	25 24.8	15 14.9	20 20.0	5 5.0	21 21.2	19 19.2	31 14.7	55 27.1	19 10.2	47 15.5	58 19.5	8 9.8	43 15.7	48 22.3	39 17.3	64 17.2
5	46 7.6	7 6.9	6 5.9	6 6.0	4 4.0	16 16.2	7 7.1	21 10.0	24 11.8	1 0.5	23 7.6	23 7.7	5 6.1	21 7.7	18 8.4	13 5.8	33 8.8
6	25 4.2	6 5.9	4 4.0	4 4.0	4 4.0	6 6.1	1 1.0	13 6.2	9 4.4	3 1.6	7 2.3	18 6.0	5 6.1	10 3.6	8 3.7	12 5.3	13 3.5
7	6 1.0	*	1 1.0	1 1.0	1 1.0	2 2.0	1 1.0	1 0.5	2 1.0	3 1.6	3 1.0	3 1.0	*	2 0.7	3 1.4	5 2.2	1 0.3
8	1 0.2	*	1 1.0	*	*	*	*	1 0.5	*	*	1 0.3	*	*	1 0.4	*	*	1 0.3
9+	3 0.5	1 1.0	*	2 2.0	*	*	*	2 0.9	1 0.5	*	1 0.3	2 0.7	1 1.2	*	2 0.9	3 1.3	*
DON'T KNOW/NO ANSWER	6 1.0	*	4 4.0	*	*	1 1.0	1 1.0	1 0.5	2 1.0	3 1.6	4 1.3	2 0.7	*	3 1.1	3 1.4	3 1.3	3 0.8
MEAN	2.82	3.16	2.75	3.11	2.45	3.34	2.76	3.06	3.26	2.41	2.76	3.09	2.54	2.84	3.17	3.05	2.85
STANDARD DEVIATION	1.46	1.41	1.49	1.54	1.29	1.54	1.28	1.60	1.46	1.12	1.42	1.48	1.62	1.40	1.41	1.59	1.38
STANDARD ERROR	0.06	0.14	0.15	0.15	0.13	0.16	0.13	0.11	0.10	0.08	0.08	0.09	0.18	0.08	0.10	0.11	0.07

Q.H TOTAL HOUSEHOLD INCOME

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
UNDER $15,000	82 13.6	6 5.9	11 10.9	15 15.0	6 6.0	25 25.3	19 19.2	39 18.5	15 7.4	28 15.1	39 12.9	43 14.4	82 100.0	*	*	48 21.3	34 9.1
UNDER $10,000	31 5.1	2 2.0	3 3.0	6 6.0	2 2.0	12 12.1	6 6.1	12 5.7	7 3.4	12 6.5	16 5.3	15 5.0	31 37.8	*	*	21 9.3	10 2.7
$10,000-$14,999	51 8.5	4 4.0	8 7.9	9 9.0	4 4.0	13 13.1	13 13.1	27 12.8	8 3.9	16 8.6	23 7.6	28 9.4	51 62.2	*	*	27 12.0	24 6.4
NO ANSWER/REFUSED	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
$15,000 OR MORE	498 82.7	86 85.1	89 88.1	84 84.0	89 89.0	73 73.7	75 75.8	164 77.7	181 89.2	151 81.2	254 83.8	243 81.5	*	274 100.0	215 100.0	168 74.7	327 87.7
$15,000-$19,999	79 13.1	19 18.8	11 10.9	5 5.0	16 16.0	16 16.2	11 11.1	29 13.7	18 8.9	32 17.2	46 15.2	33 11.1	*	79 28.8	*	42 18.7	37 9.9
$20,000-$24,999	78 13.0	10 9.9	10 9.9	14 14.0	14 14.0	14 14.1	16 16.2	31 14.7	23 11.3	24 12.9	38 12.5	40 13.4	*	78 28.5	*	34 15.1	43 11.5
$25,000-$34,999	117 19.4	20 19.8	16 15.8	28 28.0	25 25.0	13 13.1	15 15.2	40 19.0	46 22.7	31 16.7	59 19.5	57 19.1	*	117 42.7	*	41 18.2	75 20.1
$35,000-$49,999	109 18.1	15 14.9	20 19.8	22 22.0	17 17.0	18 18.2	16 16.2	35 16.6	42 20.7	32 17.2	55 18.2	54 18.1	*	*	109 50.7	30 13.3	78 20.9
$50,000 OR MORE	106 17.6	20 19.8	29 28.7	13 13.0	17 17.0	11 11.1	16 16.2	28 13.3	48 23.6	28 15.1	52 17.2	54 18.1	*	*	106 49.3	17 7.6	89 23.9
NO ANSWER/REFUSED	9 1.5	2 2.0	3 3.0	2 2.0	*	1 1.0	1 1.0	1 0.5	4 2.0	4 2.2	4 1.3	5 1.7	*	*	*	4 1.8	5 1.3
NO ANSWER/REFUSED	22 3.7	9 8.9	1 1.0	1 1.0	5 5.0	1 1.0	5 5.1	8 3.8	7 3.4	7 3.8	10 3.3	12 4.0	*	*	*	9 4.0	12 3.2

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PRODUCT BUYING OPINION SURVEY
                                                                                                                         58  2

                                             MARKET                      AGE           GENDER         INCOME        EDUCATION 
                           ----------------------------------- ----------------- ----------- ----------------- -----------
                                                       LOS                                                       H.S.
                             AT-  BOS- CHIC-  HOU-  ANG-  PHOE   18-   35-               FE- UNDER $15M-           OR  SOME
                     TOTAL LANTA   TON   AGO  STON  ELES  -NIX    34    49   50+  MALE  MALE  $15M 34.9M $35M+  LESS COLL+
                     ----- ----- ----- ----- ----- ----- ----- ----- ----- ----- ----- ----- ----- ----- ----- ----- -----
MEAN                 32.44 34.01 37.23 32.14 33.19 27.51 30.68 29.73 36.63 30.66 32.19 32.71 10.80 24.26 51.13 26.09 36.24
STANDARD DEVIATION   16.55 16.54 17.68 15.03 15.38 16.11 16.84 15.89 16.34 16.42 16.44 16.68  2.18  5.30  8.75 14.35 16.66
STANDARD ERROR        0.69  1.75  1.80  1.53  1.59  1.64  1.76  1.12  1.18  1.24  0.97  1.00  0.24  0.32  0.60  0.99  0.88
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Q.I RACE

		MARKET						AGE			GENDER		INCOME			EDUCATION	
	TOTAL	AT-LANTA	BOS-TON	CHIC-AGO	HOU-STON	LOS ANG-ELES	PHOE-NIX	18-34	35-49	50+	MALE	FE-MALE	UNDER $15M	$15M-34.9M	$35M+	H.S. OR LESS	SOME COLL+
BASE	602 100.0	101 100.0	101 100.0	100 100.0	100 100.0	99 100.0	99 100.0	211 100.0	203 100.0	186 100.0	303 100.0	298 100.0	82 100.0	274 100.0	215 100.0	225 100.0	373 100.0
WHITE	469 77.9	80 79.2	91 90.1	78 78.0	66 66.0	61 61.6	91 91.9	150 71.1	158 77.8	159 85.5	228 75.2	240 80.5	51 62.2	209 76.3	186 86.5	166 73.8	300 80.4
BLACK	93 15.4	19 18.8	8 7.9	17 17.0	23 23.0	25 25.3	1 1.0	42 19.9	36 17.7	15 8.1	53 17.5	40 13.4	23 28.0	45 16.4	20 9.3	41 18.2	52 13.9
HISPANIC	22 3.7	*	*	2 2.0	7 7.0	10 10.1	3 3.0	12 5.7	4 2.0	6 3.2	11 3.6	11 3.7	5 6.1	13 4.7	4 1.9	13 5.8	8 2.1
OTHER	9 1.5	1 1.0	*	2 2.0	4 4.0	2 2.0	*	1 0.5	4 2.0	4 2.2	5 1.7	4 1.3	*	3 1.1	4 1.9	3 1.3	6 1.6
DON'T KNOW/NO ANSWER	9 1.5	1 1.0	2 2.0	1 1.0	*	1 1.0	4 4.0	6 2.8	1 0.5	2 1.1	6 2.0	3 1.0	3 3.7	4 1.5	1 0.5	2 0.9	7 1.9

Senator DeConcini. Mr. Silbergeld.

STATEMENT OF MARK SILBERGELD, DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION, WASHINGTON, DC

Mr. Silbergeld. Thank you very much Mr. Chairman, I appreciate the opportunity to testify here this afternoon. I am speaking not only for Consumers Union, but Consumers Federation of America, and Public Citizens Congress Watch, which join us in opposing this bill, because it is anticompetitive. The cost to consumers resulting from passage of this bill is estimated to be possibly in the billions of dollars annually. I must say that is not our own estimate. It is what the parallel importers have described as the size of the problem, but I have heard no firm evidence to the contrary. Indeed I was interested in the concepts presented by the first panel. We have a new economic concept which is that an increase in supply seems to increase the price; if that's true in this economy, we're in big trouble, and secondly, no sooner did Professor Edley present two bottles of shampoo, an antidotal story in which the parallel import had a higher retail price than the authorized import, then a witness at the other end of the table said that you can find variations on both ends, so I take that representation not necessarily to be typical.

Most parallel imports are clearly lawful. The Supreme Court in the *K mart* case in 1988 confirmed that. We filed an amicus brief on the side of parallel importations supporting the Treasury regulations in that case. -S. 626 could have the same effect with the respect to imported goods as the old fair trade agreements under the Miller-Tydings Act had with respect to domestic goods, and we certainly hope the committee will not take that action. To do so would be directly contrary to this subcommittee's and the full committee's own action only 2 months ago, when it acted to strengthen the ban on such agreements with respects to goods generally.

Various consumer protection arguments which have been the focus of the hearing today have been made, and each case, the extent of the problem, if it exists, has not been documented. The Federal Trade Commission says there is not substantial consumer deception. Indeed, the Federal Trade Commission's own staff report says that there is not substantial free riding contrary to testimony that we heard from a witness on the previous panel. I have heard consistently from representatives of COPIAT and various of their members who have visited me since this issue first became a legislative concern, about the FDA problem, but I think if anybody thinks that's a problem, you ought to have the FDA in to see what they think, because I have seen no documentation of that. In fact, I've called the Associate Commissioner for Consumer Affairs and asked for the names of people who handled those kinds of complaints and, although I don't want to put that conversation on the record, because I did not represent that it might be.

The sum total of the enforcement officials opinion is that there are few isolated complaints that usually can't identify the location of the goods. Typically although there are few exceptions. There is no FDA standard involved, and it's his impression that it's a trademark holder or authorized distributor who simply wants the FDA to step in and stop the competition. If this committee is impressed that there's a problem however, I would certainly think you should hear from the FDA directly before reaching that conclusion. I would emphasize the importance of the first sale doctrine, although that does apply to copyright rather than trademarks. I would hope that if those principles are to be considered, they would be extended rather than negated in their application to trademarks as S. 626 would do.

Demarking is an interesting idea. I would like to know for instance, how you demark a Seiko watch with the name on the plate of the watch, inside the watch. Certainly opening it up to do that would void anybody's warranty, if anybody were willing to honor the warranty in the first place. I don't know how you demark products that are wrapped with the brand name and can be sold unwrapped, practically in the marketplace, like soap. I don't know how you demark aluminum cans that have the trademark printed directly on the aluminum. Demarking may also facilitate fraud. All it would take is a few bad apples in the barrel to convince consumers that they should not buy any demarked goods, once people start misrepresenting the actual, the fact that there is a famous maker when perhaps there isn't. Frankly Mr. Chairman, I don't think there's a consumer problem in the marketplace despite the representations to the contrary, and if there is, then there is certainly lesser remedies than banning all parallel imports that can be used to deal with it. Thank you very much.

[The prepared statement of Mr. Silbergeld follows:]

Testimony of
MARK SILBERGELD
Director, Washington Office
CONSUMERS UNION

Before the
SUBCOMMITTEE ON PATENTS,
COPYRIGHTS AND TRADEMARKS,
COMMITTEE ON THE JUDICIARY

TRADEMARK PROTECTION ACT

April 4, 1990

SUMMARY OF TESTIMONY

Consumers Union, Consumer Federation of America and Public Citizen's Congress Watch oppose S.626 because it is anticompetitive.

The cost to consumers resulting from passage of S.626 could be in the billions of dollars annually.

Most parallel imports are clearly lawful; S,626 would drastically change the law.

This change could have the same effect as reinstitution of the Fair Trade agreements under the Miller-Tydings Act, repealed by Congress in 1975, directly contrary to Committee action taken only two months ago to strengthen the ban on such agreements.

Various consumer protection arguments made to support S.626 do not identify widespread problems and, to the limited extent such problems exist, there are less drastic means to redress them than the anticompetitive provisions of S.626 would provide.

The First Sale doctrine of copyright should be expressly extended to trademarks, rather than negated in its application to trademarks as S.626 would do.

S.626 would mandate foreign producers' right to collect premium compensation from U.S. consumers over and above world market prices for the sale of many ordinary personal and household goods.

The subcommittee should not act to approve S.626.

* * *

Mr. Chairman, Consumers Union[1], Consumer Federation of America[2] and Public Citizen's Congress Watch[3] appreciate this opportunity to testify before the Subcommittee on S.626, the proposed Trademark Protection Act of 1988. We oppose this legislation. If enacted, it will have a serious, inflationary impact on the prices of consumer goods and could affect the availability of many goods that consumers now want and purchase in the marketplace.

S.626 would amend the Lanham Act to ban parallel imports. These goods are sometimes pejoratively called "gray market" goods, but, contrary to the implication, they are not counterfeit. They are genuine products, made outside the U.S. by a foreign producer whose trademark they bear. They are characterized as "parallel" or "gray market" simply because they are imported and distributed outside the authorized distribution channel established by the producer.

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[1] Consumers Union is a nonprofit membership organization, chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 4.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Consumer Federation of America is a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

[3] Public Citizen is a nonprofit research and advocacy organization founded by Ralph Nader in 1971, which works on behalf of its over 70 thousand members and all consumers. Congress Watch is the legislative advocacy arm of Public Citizen.

There are two primary reasons why many retailers choose to engage in parallel importation. One is price. The goods are available through parallel distribution channels at world price levels that are, typically, substantially lower than the price at which they are available to U.S. distributors from the factory or authorized middle man. The other reason is availability. The producer of such goods may be unwilling to sell even to those discounters who are the only prospective outlet in a given community. This second reason is especially important to rural areas, towns and small cities.

There is, on the other hand, a very simple reason why at least some producers would prefer to limit distribution of their product to authorized channels. This practice permits them to control quantity and, hence, price. By controlling the number and location of retail competitors that carry a product, a producer can limit domestic price competition and maintain higher retail prices, as a result of which it can realize a higher wholesale price for the goods sold in the U.S. Once parallel imports show up in a retail market, retail price control by the producer is weakened, competitive pressures force authorized dealers to lower prices and the producer has less leeway to charge high wholesale prices. This does not, however, justify great sympathy for the foreign producer. Remember that the lower wholesale price for the "parallel" units of the product is one the manufacturer has voluntarily set and accepted; presumably, it yields a margin of profit the producer is willing to live with. What the producer loses as a result of parallel imports is the opportunity to realize a premium for the American market through control of supply and price after the first sale of the product.

What would enactment of S.626 mean to the American consumer? Parallel imports create strong price competition and a greater variety of goods to choose from. If those parallel goods are removed from the marketplace as a result of S.626, consumers will soon pay more for imported goods now available through parallel distribution channels, and they will find fewer goods available. The effect of S.626 will not be merely to eliminate the lower-priced sources for goods that are now imported through parallel channels; the prices charged by authorized dealers also will go up, as the competition from parallel sources is eliminated. And, many of those goods will be available only at exclusive stores; they will disappear from the shelves of discounters.

The restriction of imported goods only to authorized channels of distribution would have much the same effect as if Fair

Trade Laws were to be restored. Producers who found it beneficial to do so would channel their products to distributors and retailers who maintained full price. On February 22, 1990, the Judiciary Committee reported favorably to the Senate S.865, a bill to strengthen the laws against resale price maintenance. The effect of enactment of S.626 would be ironic and contrary to the intent of the Committee's action on S.865. It is hard to believe that this Committee would act to reverse the effects of the 1975 law that repealed the Miller-Tydings Act, within weeks of having voted to strengthen it. But S.626 would have that same effect. The consumer would pay dearly for that action.

The cost to consumers of having retail competition eliminated through such measures as S.626 cannot be precisely calculated, but discounters believe that it would be in the billions annually. The differential between the full retail price and the discount price for a good that is parallel-imported is typically in the range of 25% - 40%, according to discounters. If there were to be no parallel imports, consumers would pay those differences.

In addition, there would be the aforementioned, upward price movement of the full price of the products as discount competition disappeared. Therefore, even consumers who now choose to pay full retail price to exclusive, authorized dealers would pay that difference.

In sum, all consumers would pay substantially more for home electronics, watches, cameras, tableware and a wide variety of personal care products.

Proponents of S.626 seek to reduce, not enhance, competition. Because competition is the cornerstone of our economy, those proponents should bear a heavy burden of persuasion. I have heard their policy arguments repeatedly. And I have watched as those arguments changed over time. In our view, the proponents have not met that burden.

At first, the argument for banning parallel imports was that the Tariff Act did not sanction them and the Treasury Department's regulations were contrary to the statute. However, S.626 has been introduced not to clarify the law, but to change it drastically. The Supreme Court in K Mart v. Cartier[4] ruled that in most respects the Treasury Department's regulations permitting parallel imports are valid under the Tariff Act. There is no question, then, about the legality of current parallel importations. The proponents of S.626 seek its passage because they do not like the law, not because they cannot obtain enforcement of it.

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[4] 108 S.Ct.950 (1988). Consumers Union, among many others, filed a brief *amicus curiae* in this case in support of the Customs Service regulations.

Proponents also argued two consumer protection considerations for banning parallel imports. One argument was that manufacturers justifiably would not honor warranties when the product was imported through parallel channels. The other was that products so imported often lacked necessary English-language instructions. However, this argument essentially is one to throw the baby out with the bath water. The General Business Laws of the State of New York require adequate disclosure of either of these conditions[5]. It is our understanding that, in response to adoption of this requirement, a high proportion of parallel imports carry a distributor's warranty in situations where the manufacturer will not honor its own warranty and that they contain necessary English-language instructions. Further, to the extent that this may not be the case, the straight forward solution would be to seek a rule like the New York law from the Federal Trade Commission under Section 5 of the Federal Trade Commission Act.[6] However, the commercial interests that seek enactment of S.626 have never availed themselves of this opportunity. Only two reasons can account for that failure. Either there is no current, substantial problem with these practices, or COPIAT (Coalition to Preserve the

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[5] NY CLS Gen. Bus. Sec. 218-aa.

[6] See "Comments of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission on Gray Market Policy Options Facing The United States Customs Service," October 17, 1986 (hereinafter, "FTC Comments"), pp. 5-6.

Integrity of American Trademarks) prefers to see the problem continue, as an argument in favor of an outright ban on parallel imports. Neither of these possible explanations is a good public policy reason for supporting the legislation.

Proponents of S.626 have argued, as well, that parallel imports should be banned because certain personal care products that meet the standards of other countries, but not U.S. standards, are imported into the U.S. Imported products must, of course, meet U.S. standards. However, our own inquiries to the Food and Drug Administration indicate few formal requests to act against parallel imports that actually violate an established U.S. standard. Most of the few allegations that have been made to FDA apparently either do not involve violation of a standard or do not provide the location of the allegedly violative goods. FDA enforcement officials indicate their impression that in such instances the complaining trademark holder thinks FDA should act simply on the basis of a trademark holder's commercial interest in controlling goods bearings its trademark, rather than on a health standards basis. On a very few occasions, FDA has received and acted on a complaint involving an actual health standard violation where the complaining party has identified the location of the goods.

Proponents of S.626 have not documented their assertions of FDA's failure to enforce U.S. standards. Nor have they sought Congressional oversight hearings if, in fact, FDA is failing to enforce standards. There has been no response to these suggestions. The Subcommittee certainly should hear directly from FDA before it decides to give any weight to arguments involving protection of public health.

Proponents of S.626 also have argued that parallel importers are, unfairly, "free riders" on the promotional efforts of trademark holders and their authorized distributors and retailers. However, it is not clear that whatever "free rider" benefits may result from parallel importation are net, rather than gross benefits. Nor does it follow that the trademark holder is not adequately compensated. It has, after all, sold the items in question at a wholesale price it deemed adequate to induce it to part title with the goods. Nor is it clear that the authorized retailer has lost anything to which it is entitled. It has not been shown that the sales at discount would have been made at full price. Even if those cases were made, however, it does not follow that legislation is an appropriate remedy. The Congress will have opened its doors to a host of demands for new legislation if it seeks to legislate away "free rides" in the market place. And it would be probable, in that event, that the strongest of the competing commercial interests, rather than the public interest, will govern the outcome of such battles.[7]

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[7] For an analysis of the "free ride" argument, see FTC Comments, *supra*, pp. 3-5.

Opponents of parallel imports also argue, as part of the free rider issue, that full price retailers provide consumers with service that discounters who sell parallel imports do not. But the consumer preference for lower prices over services is a valid one. No reason has been advanced that would justify legislating against it.

One solution opponents of parallel imports have presented is that such goods, at the very least, should be "demarked" and sold without labels. We would very strongly oppose such a requirement for three reasons. First, we object to removing valuable consumer information from the marketplace. Brand names are a major indicator of the probable quality and reliability of a product. Second, demarking creates a prime opportunity for a few "bad actors" to misrepresent the brand of product they are selling. Third, for the reason we have just suggested regarding deception, such a requirement could be tantamount to a ban. Many consumers would be loathe to accept representations as to the brand of a product if the brand name is removed, especially if there were even occasional news reports of prosecutions for deceptive misrepresentations in this context. And, if many consumers reacted in this fashion, then the level of demand necessary for discounters to stock an item might well be inadequate.[8]

Finally, there is the overarching consideration of the First Sale doctrine concept. That time-honored doctrine preserves competition. It holds that a producer of copyrighted materials cannot control the fact or conditions of further sales once it parts title to the goods.[9] The competition fostered by the doctrine protects consumers by preventing producers from engaging in various forms of artificial supply limitation and price maintenance through exclusive dealings and other devices. And it protects entrepreneurial middle-men who invest in stock for resale with the expectation that they can recoup their investment by making any lawful sale of a product they can lawfully acquire. The intent of producers who would ban parallel imports has been best characterized by the U. S. Court of Appeals for the Third Circuit, which stated in its opinion in the Sebastian International case:

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[8] We have heard the argument by some proponents of S.626 that one New York retail clothier, Loehmann's, effectively markets brand name clothing with the labels removed. However, clothing is more susceptible than many other products to consumer evaluation by a brief, visual and manual inspection. Further, if widespread consumer acceptance of this phenomenon were likely, it should have happened by now. We suspect that if the practice were widespread, there would be just enough "bad apples" engaged in deception to spoil the barrel for everyone.

[9] See NEC Electronics v. CAL Circuit Abco, 810 F.2d 1506 (9th Cir. 1987); Sebastian International, Inc. v. Consumer Contacts (PTY) Ltd., 847 F.2d 1093 (3rd Cir. 1988).

> This case comes to us in the guise of an alleged copyright infringement but, in reality, is an attempt by a domestic manufacturer to prevent the importation of its own products by the "gray market".

Relying upon the First Sale doctrine, the court ruled in favor of the parallel importer. The Third Circuit noted that the doctrine is based on economic as well as legal grounds:

> There is, however, an economic reason for the rule as well. [Citing authority] "the ultimate question under the 'first sale' doctrine is whether or not there has been such a disposition of the copyrighted article that it may fairly be said that the copyright proprietor has received his reward for its use."

If anything, Congress should expressly extend the First Sale doctrine to trademarks, rather than negate that application. As the Court noted in the NEC Electronics case[10], "Once a trademark owner sells his product, the buyer ordinarily may resell the product under the original mark without incurring any trademark law liability." The Court quite succinctly summarized the policy conclusion that we believe this Subcommittee should reach:

> If [the Japanese manufacturer] chooses to sell abroad at lower prices than those it could obtain for the identical product here, that is its business. In doing so, however, it cannot look to United States trademark law to insulate the American market or to vitiate the effects of international trade. This country's

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[10] Note 9, supra.

> trademark law does not offer [the foreign manufacturer] a vehicle for establishing a worldwide discriminatory pricing scheme simply through the expedient of setting up an American subsidiary with nominal title to its mark.[11]

Parallel imports do not involve counterfeit goods and they do not involve questions of who has the right to place the mark holder's trademark on which goods. They involve, quite simply, second and subsequent sales of goods made and marked by the mark holder or its legitimate licensee for which the mark holder already has been compensated at a price set by the mark holder. It seems clear that, under the test of the First Sale doctrine, the mark holder *has* been adequately compensated. There is no public policy reason that would justify the Congress stepping into the marketplace and mandating premium compensation for the mark holder at the consumer's expense, simply because the goods are being sold to American consumers.

Mr. Chairman, Consumers Union, Consumer Federation of America and Public Citizen's Congress Watch appreciate this opportunity to present our view on S.626. We urge the Subcommittee *not* to act favorably on this legislation. All consumers would benefit from such a decision.

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[11] NEC Electronics, *supra*, at pp. 1516-17.

Senator DeConcini. Thank you very much.

Mr. Comanor.

STATEMENT OF WILLIAM S. COMANOR, ECONOMIC CONSULTANT, SANTA BARBARA, CA

Mr. Comanor. I have a formal statement, which I hope will be in the record.

Senator DeConcini. All the statements will appear in the record.

Mr. Comanor. I am a professor of economics at the University of California at Santa Barbara, and between 1978 and 1980, I was Chief Economist and Director of the Bureau of Economics at the Federal Trade Commission.

Despite the evident changes in approach toward economic policy that occurred since my years at the Commission and more recently, I'm struck by the fact that the 1986 FTC report on parallel imports does the same analysis and reaches the same conclusion that I would have reached in my years at the Commission. On the issue before this subcommittee, I fully support the positions taken in the 1986 FTC report. I think there's little doubt that parallel imports lead to lower consumer prices, with clear benefits to consumer welfare. There are two vehicles through which lower price can resolve. First, independent import. Importers set lower prices, typically for their products, than do authorized distributors, and second, the whole process of parallel imports leads to lower prices overall. Let me point to just a few examples. In the file table to my prepared statement, I provide a table which describes retail prices for Seiko watches, and one observes that parallel imports or products which are sold from parallel imports are substantially lower priced than the prices charged by authorized distributors. Another example is retail prices for European perfumes, for three examples which indicated right here on the table. For Joy toilet water over there, authorized dealers charge a $60 price per bottle, while the discount price is $34.95, a difference of 42 percent. For Ann Kline perfume, which is right here, the authorized dealers charge $32, while discount stores charge $14.88, and for Quoroum toilet water for men, which is the far item there, the authorized dealer price is $23 and the discount store is $14.58. These products were all purchased in the Miami area on March 30, and the price tags are right on the bottles. The average price difference we're talking about is 44 percent. I'm struck by the fact that even the proponents of S. 626 acknowledge the fact that parallel imports lead to lower average consumer prices. So if you look at the COPIAT-sponsored report of 1986, you see a clear acknowledgement of that fact. It seems to me that lower consumer prices follow from increased competition which results from parallel imports. The vigor of competition is increased, and consumer prices decline as a direct result.

The opponents of parallel imports, suggest that lower prices are the problem and not to be sought, which is a strange turnabout. Higher consumer prices are preferred, so their argument goes, in order that authorized distributors can invest heavily in marketing the product and recoup this investment. An essential part of the free-rider argument, which we've heard so much about, is that higher prices are needed so that authorized distributors can spend what they want on marketing the product. Or in other words, that what is best for the authorized distributor is necessarily best for consumer, despite the higher prices the consumer would be forced to pay.

I noted that on the previous panel Mr. DeMuth talked about this issue, and maybe I can comment on some of the things that he said. He suggested that there where alternate explanations for parallel imports—one might be free riding, and another might be arbitrating—difference in prices in the United States and abroad. But whether he's correct or not, this matter is not what determines the presence of parallel imports, but rather the effect on consumer welfare, and I submit that one cannot evaluate this issue independent of consumer prices. So if consumers get a different product, but at lower price, perhaps that indicates that's what they prefer—that that's the choice they would like to make.

It seems to me that parallel imports promote more competitive results in the market for trademark items, meets the lower consumer prices, and increases consumer welfare, and I think that no action should be taken that limit these imports. Thank you very much.

[The prepared statement of Mr. Comanor follows:]

Statement
on the
Economic and Policy Implications
# of Parallel Imports

William S. Comanor
Professor of Economics
University of California, Santa Barbara

April 4, 1990

Submitted to the Subcommittee on Patents, Copyrights and Trademarks, Committee on the Judiciary, United States Senate in opposition to S. 626, a bill to amend the Lanham Act to prohibit parallel imports. This statement was prepared at the request of the American Free Trade Association, the National Association of Catalog Showroom Merchandisers, and the International Mass Retail Association.

I

This statement reviews the economic and policy implications of the current system of parallel imports into the United States. As such, it deals with similar issues to those encountered during my tenure between 1978 and 1980 as Director of the Bureau of Economics at the Federal Trade Commission. The Commission's responsibility to study and report on matters dealing with the structure and performance of the American economy are carried out primarily in the Bureau of Economics. My comments on the issue of parallel imports rely on the same criteria used at the Commission.

As is well known, a substantial shift in economic policy occurred with the arrival of the Reagan administration in January 1981. Although both approaches to economic policy rested ultimately on consumer welfare, there were widely different views on what factors promoted this result. This being so, it is striking to consider instances where both the prior and more recent approaches lead to the same policy judgments, which is the case with regard to parallel imports. That conclusion is that parallel imports enhance competition and contribute to lower prices for American consumers.

As Director of the Bureau of Economics at the Federal Trade Commission during the Carter administration, I can attest to the fact that the views expressed by the Commission staff on this issue in 1986[1], during the Reagan administration, were similar to those which would have been reached earlier. There is general agreement that parallel imports promote the interests of consumers.

Before proceeding to the specific issues that arise with parallel imports, the underlying criteria should be acknowledged explicitly. These criteria rest on our judgment that free competitive markets best serve the interests of all Americans. For this reason, the question of parallel imports should be evaluated on these terms. The national interest is not served when competition is restrained or when monopolistic positions are protected.

Our goal is to retard the development of monopolistic elements in the economy. Not only do monopolistic practices distort the allocation of resources and make the overall economy less efficient, but equally important, monopoly prices impose what amounts to a tax on consumers who must purchase the product. In effect, monopolists add a tax on all units sold, but it is not one that is used for public purposes. Rather, it adds to the coffers of monopolistic firms. Moreover, when these firms are based abroad, imposing a monopolistic surcharge adds to the national deficit in the balance of trade, and the additional profits may even escape U.S. taxation.[2] For all of these reasons, the question of parallel imports should be answered in terms of its implications for competitive markets in the United States.

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[1] Comments of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission, "Gray Market Policy Options Facing the United States Customs Service," October 17, 1986.

To be sure, the goal of free and competitive markets cannot be pursued naively. Markets operate effectively only when consumers are informed about the products they are purchasing so they can make adequate judgments. To assure that consumers receive essential information is an explicit responsibility of the FTC, as well as state and local consumer protection agencies, for such information leads to more competitive markets. Ignorance is a well known source of monopoly so we must be concerned as well with the available provision of appropriate information to consumers.

II

In one respect, there is little controversy on the impact of parallel imports, which is their impact on consumer prices. There is little doubt but that these imports lead to lower consumer prices. Not only do independent importers set lower prices for their products but also the presence of these imports limits the prices charged by authorized importers. Since the same trademarked products, imported by both types of distributors, compete with one another, lower rival prices have a restraining effect on the prices charged by authorized importers. Thus, American consumers benefit in two ways from these imports: those who purchase the parallel imports pay less and those who purchase the authorized imports face a lower price than would otherwise be charged.

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[2] For a discussion of this issue, see Richard B. Kelly, "An Overview of the Influx of Gray Market Goods into the United States," *North Carolina Journal of International Law and Commercial Regulation*, Vol. 11, Spring 1986.

The effect of parallel imports on consumer prices is readily documented. In one example, the leading Japanese camera manufacturers reduced the prices of their cameras sold in the United States by more than 20 percent to meet the competition of independent importers. In another example, the list retail prices of Seiko watches sold in the United States was between 25 and 45 percent higher than the prices charged by independent importers; and authorized distributors customarily sell these watches at the full list price.[3] As a result, catalog showrooms sold virtually identical products at much lower prices. Thus, both price effects are present.

Even a study supported by the proponents of S. 626 acknowledge that parallel imports lead to lower average consumer prices. Their report states that "gray-market imports nevertheless affect U.S. product prices, and in the short run make them lower than they otherwise would be."[4] All agree that parallel imports lead to lower prices for American consumers.

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[3] This information was provided by the National Association of Catalog Showroom Merchandisers. Some supporting data are presented in the attached table.

The lower prices that consumers pay for the trademarked products is indicative of the heightened competition in retail markets that follow from parallel imports. Indeed, the primary reason behind these lower prices is the increased competition. Therefore, parallel imports promote the desired result of more competitive markets.

III

While the opponents of parallel imports acknowledge that lower consumer prices result, they suggest that the lower prices demonstrate the defects of the current system. "It is by reducing the price at which authorized distributors can sell their products that free riding erodes returns from their marketing investments."[5] They argue, in effect, that even though consumers gain from lower prices, authorized distributors may not achieve the same returns from their marketing investments in the United States because of competition from parallel imports. Even if correct, this result is inherent in the competitive process, and consumers should not be forced to pay increased prices so that particular firms can recoup their investment.

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[4] Comments of the Coalition to Preserve the Integrity of American Trademarks, United States Customs Service, October 20, 1986, p. 33.

[5] *Ibid.*

The opposing argument proceeds: If the required returns on these investments are not received, authorized distributors will spend less on marketing the trademarked items, and consumers will lose as a result. What this argument suggests is that the level of marketing investment depends on the price paid for the trademarked item, and that lower prices lead to lower expenditures on advertising and other marketing efforts.

While firms may well spend less in these areas than they might wish, there is no reason to believe that consumers prefer the same level of marketing investments. Indeed, consumers might well prefer lower product prices and fewer advertising expenditures. A major difficulty with the free riding argument is that it rests on the presumption that the level of marketing investment desired by authorized distributors is the same level as that which maximizes consumer welfare. However, this correspondence does not appear to exist.[6]

In discussing the free rider issue, the FTC Report suggests that any such problems "could be addressed by the manufacturers'

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[6] For a technical discussion of these issues in a related area, see William S. Comanor, "Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy," *Harvard Law Review*, May 1985. See also the Statement of William S. Comanor, submitted to the United States Senate, Committee on the Judiciary, June 1, 1989, in support of S. 865, the Retail Price Fixing Prevention Act of 1989.

own private initiatives."[7] If such problems are present, private remedies exist, and we should not limit competition in these markets to alleviate allegations of free rider problems. Eliminating a substantial segment of the market, which exists because of parallel imports, is not an appropriate means to deal with such problems.

The issue of consumer deception must also be addressed. In principle, such deception could exist if there were substantial quality differences between the products imported by authorized and independent importers, and consumers were not aware of these differences. However, we are dealing with products manufactured by the same firm, so these differences could only arise in the trans-shipment process or in other products or services associated with the underlying product.

The mere fact of differences in quality between the products sold by authorized and independent importers is not in itself a problem so long as consumers are aware of these differences. Where such differences exist, lower quality products will sell for lower prices, and consumers will be able to choose between higher quality, higher priced products and lower quality, lower priced ones. Providing consumers with such choices is an important objective of a competitive market system.

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[7] FTC Report, *op. cit.*, p. 4.

In this regard, the FTC Report reached various conclusions. First, it noted that the "Commission staff investigations of consumer deception in connection with gray-market goods have not produced evidence of substantial systematic deception to date," and furthermore, "the FTC already has authority to deal with consumer deception problems, including deception problems involving gray market imports, and to date has not determined that there is any need to take action in this area."[8]

Second, the Commission staff suggested that there are private remedies available to correct for any deception that might exist, and authorized importers have an economic incentive to do so. For example, the Report suggested that "authorized distributors could affix additional trademarks indicating that their items are authorized for U.S. distribution and have been distributed in the authorized manner. Similarly, authorized distributors could inform customers of the advantages of their products, e.g., warranty terms."[9] For all of these reasons, the

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[8] *Ibid.*, pp. 5-6.

[9] *Ibid.*, pp. 7-8.

FTC staff concluded that consumer deception was not a sufficient to counter the substantial benefits of parallel imports.

IV

The Federal Trade Commission Report suggested various factors that might lead to parallel imports. These factors include the presence of manufacturers' price discrimination in which higher prices are charged to American consumers but lower prices elsewhere. In this case, American consumers are charged more for the product, and the resulting higher profits benefit both authorized distributors and the foreign manufacturer.

However, discriminatory pricing can persist only if competition is avoided, and it is precisely the fact of parallel imports that provides the competition needed to alleviate such problems. By undercutting higher established prices, competitive pressures instigated by independent importers disrupt the process of discriminatory pricing and promote more competitive results. As a consequence, consumers benefit.

The FTC Report discusses other explanations as well, including a response to lags in the exchange rate adjustment process, but finds that "the available empirical evidence is not systematic or complete enough to enable us to accept or reject any of the theories for gray-market imports."[10] So we cannot determine which factors have actually led to the current system. Still, the Report concludes that the available evidence does not indicate that free rider problems or consumer deception are the reasons for parallel imports.[11]

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[10] *Ibid.*, p. 21.

There are no reasons to prohibit parallel imports. On the contrary, they lead to more competitive markets and lower consumer prices for trademarked items. Ultimately, the question of parallel imports is a consumer issue, and consumer welfare is enhanced through greater competition and lower prices. Free and open competition is essential in regard to channels of distribution as in any other sector of the economy. For these reasons, public policy, whether embodied in new legislation or in administrative rules, should support these imports.

Congress should support the recent Supreme Court decision in *K-Mart v. Cartier* and confirm the U.S. Customs Regulations that have been in effect for half a century.

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[11] *Ibid.*, p. 20.

Retail Prices Charged in the United States by Authorized and Independent Distributors: the Case of Seiko Watches

Seiko Model ID No.	Wholesale Cost Paid by Wholly Owned U.S. Subsidiary of Japanese Manufacturer	Retail List Price*	Parallel Import Wholesale Price	Retail Prices Charged by Independent Distributors	
				No. 1	No. 2
Supplier No. 1					
7A38-727065**	$146	$325	$128	$250	$230
6F-22700GL***	113	250	93	188	170
2E20-6010G	124	275	105	200	190
2E20-6380G	124	275	105	220	190
1F20-5B906B	113	250	90	190	188
4K2200-40GL	113	250	93	188	170
5Y30-5R50GB	79	175	60	130	130
52Y3-8A60G	124	275	103	190	190
Supplier No. 2					
SDWO42	$146	$325	$135	$260	$250
SXY002	113	250	100	200	170
SBG166	79	175	65	140	130
SXS868	68	150	55	120	115

Notes:

* Authorized dealers customarily sell at the retail list price.
** For example, this model is a quartz chronograph watch which shows day and date.
*** For example, this model is a gentleman's goldstone A/A lunar watch.

Source: National Association of Catalog Showroom Merchandisers.

Senator DECONCINI. Thank you, gentlemen.

Mr. Comanor, those items that you have there, are they the same thing?

Mr. COMANOR. To the best of my knowledge they are, sir. I mean, I didn't open them, they are still closed.

Senator DECONCINI. Let me ask you this question and anybody who wants to answer it, please do so. One answer seems to me, is that the person or the company that owns the trademark, if they're going to manufacture it in another country, they could place some self restraints that they can't export it, right?

Mr. COMANOR. In principle, that's possible.

Senator DECONCINI. Yes. I mean isn't this a doable thing in your opinion?

Mr. COMANOR. That depends on the nature of the relationships between the manufacturer and the person to whom he makes the original sale.

Senator DECONCINI. I guess what I'm trying to say—is there a problem here that the owner of the trademark is not really being totally honest about it either? Because they're not taking steps—if they don't want these situations occurring, they're not taking steps to prohibit it. They control the trademark in the foreign country. They could say, look, you can't use my trademark if you export it to the United States, period, and when I catch the first one in here, the contract says you lose the trademark. Is that illogical or is it just the greed of the trademark owner, they want it both ways?

Mr. COMANOR. Well, let me just say that along those lines, Mr. Chairman, first of all it seems to me the easiest thing to do is to use different trade dress, and I see no reason why the trade dress for Johnson & Johnson's talc intended to be sold only in Brazil has to look like the talc that's intended to be sold only in North America or the United States.

Senator DECONCINI. Well, the answer to that is an international market, and you know you buy marketing at the Olympics, you buy it for Johnson & Johnson, you don't buy it for Johnson & Johnson of Brazil——

Mr. COMANOR. But trade dress as opposed to trademark, Mr. Chairman, means that they use the Johnson & Johnson trademark, but they use different colors, or they use additional—there is no reason there cannot be a legend on the side of that plain panel on either side of the bottle of talc, that says in Spanish, "made for sale in South America," or simply made by Johnson & Johnson Co. in Spanish with Y instead of the ampersand or something that would help to protect them.

To get even more directly to your point, your basic point, when COPIAT first contacted me—in effect lobbied me, although I'm not a public official—several years ago, they focused then upon two issues, the warranty issue that the manufacturer would not honor and the English language instructions issue. My comment was, I think, if that is a widespread problem you should go directly to the Federal Trade Commission and seek a rule under section 5. I've seen no petition filed there. I think they find it convenient to have this problem, that which they assert to be a problem, because it's a useful argument for throwing out the baby with the bath water.

Senator DECONCINI. Let me ask you this, Mr. Silbergeld. We've seen some dramatic examples of product differences. The 50,000 units of Oil of Olay that had red dye No. 2—and there was no question that from the standards in the United States that was against the law, and had to be taken off the shelf—in your testimony you state that the difference in quality between products sold by authorized distributor and independent importers is not itself a problem so long as the consumers are aware of these differences.

Mr. SILBERGELD. Well, if there are standards, of course, Mr. Chairman, I do have a section in my testimony that addresses the FDA problem, and I would certainly think that if the FDA is not doing its job, and this is contributing to that problem, we ought to hear from that.

Senator DECONCINI. So in that case, it's a public interest problem that should be addressed by the governmental agency that has authority for public health?

Mr. SILBERGELD. Precisely, but if we're talking about the difference in the viscosity of shampoo, rather than a standard with respect to the content, it seems to me that if the public wants a less viscous shampoo in order to save 59 cents, the public should be entitled to make that selection.

Senator DECONCINI. What about such things as allergies or something that is not quite as bad as red dye No. 2 but which may bother my skin, but not bother your skin, and if you're in Brazil it may not bother Brazilians, but it may bother a good percentage of, say, Americans?

Mr. SILBERGELD. I have the big thick book that COPIAT first started this effort with, and it has many of those examples, or at least a substantial number of those, and the answer is it's a logical fallacy. It assumes that that problem only happens with respect to parallel imports, but in fact somebody who has sensitive skin may have a reaction to Zest and not Camay, or Camay and not Dial. So it's not a problem of parallel import, it's a problem of a small percentage of the population having a particular problem that can arise with either imported or domestic products.

Senator DECONCINI. Now, your point in objecting to the demarking, say, on a Seiko watch or a bar of soap. I suspect that their suggestion is that if you're going to be a Seiko manufacturer in Mexico or Taiwan, and you're going to export to the United States, you don't manufacture it with that mark on it. Don't you think that's what they are talking about? They're not suggesting, are they, that you open up bars of soap and take off the name?

Mr. SILBERGELD. Frankly, I don't know what they're suggesting, because—they could do that now. I suspect that when you open that package of Camay and take off the wrapper, I think you see the word Camay impressed into the soap in the form of a pressing or molding.

Senator DECONCINI. For demarking purposes they could easily demark the label, or on the watch they can manufacture it without Seiko on it and still export it?

Mr. SILBERGELD. Right, but they can do that now.

Senator DECONCINI. And they don't.

Now, Mr. Stevenson, in the retail business that you're in and the volume of products that you have, how can you tell the difference between a gray market and a counterfeit market Seiko watch when your buyers are out buying them?

Mr. STEVENSON. Well, we deal with legitimate people. We're not buying anything off the back of a truck or anything here——

Senator DECONCINI. You're satisfied that your importers are dealing with genuine Seiko watches or genuine Camay soap, and not something that may be counterfeit?

Mr. STEVENSON. To the best of our ability, yes.

Senator DECONCINI. Have you come across counterfeit goods that your clients or your people have purchased either by mistake or on purpose?

Mr. STEVENSON. Not to my knowledge.

Senator DECONCINI. You have never had any goods returned that have been investigated and turned out to be counterfeit instead of gray market?

Mr. STEELE. I would answer that. I am Bob Steele from Steele, Goldman & Silcox, counsel for K mart.

We have investigated from time to time. If a manufacturer had said to us, "You have a product that doesn't appear to be our product," we'd take it off the market at any time, but this is not a problem, something that has come up, Senator, and in recent years it hasn't come up at all. We have cooperated very closely with this committee in the drafting of the Counterfeiting Act of 1984, which seems to have had a great effect in clearing up that problem of counterfeiting in the marketplace. The legislation has been very salutary in its effect in the marketplace.

Senator DECONCINI. Mr. Stevenson, with the business that you're in, you indicated that at K mart if you buy a Seiko watch and it happens to be a gray-market one or parallel import, not covered by the warranty, you cover it.

Mr. STEVENSON. We cover it, yes.

Senator DECONCINI. What do you give them back? Do you give them another gray-market watch, or do you give them a——

Mr. STEVENSON. Their money.

Senator DECONCINI. You give them their money back?

Mr. STEVENSON. Yes.

Senator DECONCINI. So that might be different than warranty. The warranty may say we'll give you a workable watch, but you match it at least. The consumer is not out anything.

Mr. STEVENSON. I think any legitimate retailer is interested in keeping the customer happy and in repeat business, so as a practical matter there isn't a problem.

Senator DECONCINI. Have you done any studies as to what kind of returns you have on gray-market items versus non-gray-market items?

Mr. STEVENSON. There's no difference.

Senator DECONCINI. There's no difference that you know of.

Thank you, gentlemen, very much. That's very helpful testimony. Senator Hatch has questions and so do I. The time has run out, but we may submit them to you, and if you can help us answer them for the record we'd appreciate it. Thank you very much.

[Responses of panel members to questions submitted by Senators DeConcini, Grassley, and Hatch follow:]

K MART CORPORATION
INTERNATIONAL HEADQUARTERS
3100 WEST BIG BEAVER RD.
TROY, MICHIGAN 48084

A. ROBERT STEVENSON
VICE PRESIDENT
PUBLIC AFFAIRS

April 27, 1990

Honorable Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached for the record of the April 4 hearing on S. 626 are my responses to additional questions submitted to me in writing by yourself. I appreciate the opportunity to have testified and hope that these responses will contribute to the record.

Sincerely,

A. Robert Stevenson

A. Robert Stevenson

RESPONSES OF INTERNATIONAL MASS RETAIL ASSOCIATION
BY A. ROBERT STEVENSON, VICE PRESIDENT,
GOVERNMENT AND PUBLIC RELATIONS,
K MART CORPORATION, TROY, MICHIGAN
TO WRITTEN QUESTIONS SUBMITTED BY CHAIRMAN DENNIS DECONCINI

1. Q. How do you justify not having a share in the marketing and other costs of developing good will for a trademarked product?

A. K mart and other IMRA retailers who handle parallel imports do share in the marketing and other costs of developing good will for a trademark product. At K mart, our advertising of all trademarked products is substantial. I doubt if any authorized retailer has a greater advertising budget on a product by product basis. Similarly, the exposure of a product in thousands of IMRA member retail stores cannot help but have a substantial impact in developing the goodwill and consumer knowledge of the product involved.

2. Q. How do you feel about allowing gray market goods to be imported as long as they are demarked and how would this change the amount you could charge for an item?

A. Demarking has never been a practical or proper alternative to parallel imports. The purpose of the demarking proposal is apparently to prevent the sale of parallel imports by ascribing some sense of lower status or quality. Even so, it would be absolutely impossible to demark most trademarked products which are imported, without the risk of destroying the product. A Sieko watch, a typical example, bears trademark references in a number of different places both inside and outside of the case. The cost and difficulty of demarking this, and other parallel imports, render the process impossible and inappropriate. On the other hand, a manufacturer is always free to use differing brands in differing countries.

3. Q. K mart's written testimony asserts that many manufacturers refuse to deal directly with the company for various reasons, which often amounts to price fixing. Please indicate the number of antitrust suits that have been filed by K mart, other members of the IMRA, or the Government to combat these practices.

A. A great many famous brand manufacturers refuse to sell to discounters, resulting in de facto price fixing. There have been numerous proceedings in the past initiated by the Government to combat price fixing. United States v. Parke Davis & Co., 362 U.S. 29 (1960), and United States v. General Motors Corp., 384 U.S. 127 (1966), are probably the leading precedents. However, there have also been a number of private suits. K mart itself initiated action to halt price fixing against Rachel Perry, Inc., a manufacturer of skin care products, in November 1983. A copy of a consent decree entered, which prohibits Rachel Perry from terminating relations with discount retailers, is attached hereto for the record. Neither IMRA nor K mart has a system of recording actions which may have been initiated by other members of IMRA involving resale price maintenance.

4. Q. You say in your testimony that if the prices on parallel goods were the same or higher than the U.S. authorized goods, there would be no reason for the U.S. trademark holder to complain. Wouldn't the gray market goods still displace the sale of U.S. authorized goods?

A. No. To date there have been no known empirical data presented that would show that parallel imports actually displaced the sale of so called "U.S. authorized goods." Parallel imports, however, are generated by price differentials created by the manufacturers. If the prices on parallel imports were generally the same or higher than the prices on the so called "authorized goods," the market for parallel imports would not exist, or would be substantially minimized. For example, when Japanese manufacturers lowered U.S. prices on 35 mm cameras to the same level as foreign prices, parallel imports decreased. Parallel import merchandise is a price driven phenomenon.

5. Q. Why doesn't K mart disclose to its customers that they are purchasing gray market products, particularly as with soaps and detergents where the gray market products may differ significantly from the authorized products?

A. K mart does not deal in parallel imported soaps and detergents; however, in general, parallel imported merchandise is completely identical to USA-distributed merchandise. In addition, if there is any quality or safety defect in overseas distributed merchandise, then the manufacturer obviously has a legal and social duty not to create and distribute unsafe or defective merchandise. The responsibility for disclosing the attributes of various products purchased and sold by a retailer rests primarily with the manufacturer of those products. The manufacturer knows better than anyone what the components of any particular products are, and whether one product differs significantly from another. The retailer in most instances simply does not have access to such information. As the responses to your questions in the April 4 hearing demonstrated, it would be rather simple for the manufacturer to disclose any product differential factors which he considers necessary to disclose on the package of those goods. This would of course prevent any possible questions which might arise.

ANSWERS TO QUESTIONS OF SENATOR CHARLES E. GRASSLEY

2. Q. Should legitimate, non-counterfeit, so-called gray market products, which pose no risk to consumers, be banned from importation?

A. No. Parallel import merchandise should not be banned from importation, as consumer efficiency and competition are promoted by an open border. No modern economy is an island unto itself.

ANSWERS TO QUESTIONS BY SENATOR HATCH

1. Q. In your written testimony, you indicate that many manufacturers refuse to deal directly with the company for various reasons, which often amount to thinly veiled attempts at price fixing. Please indicate for the subcommittee the success that you have experienced in challenging these practices through antitrust suits.

A. See answer to question No. 3 in Senator DeConcini's questions.

2. Q. What percentage of your sales are made up of gray market good?

A. It is impossible to determine the exact percentage of K mart sales made up by parallel imports. Indeed, it is not always possible for the retailers to ascertain whether a product is a so called, "authorized product" or a "parallel import," since the products in each category are generally identical.

3. Q. Does K mart disclose to its customers that they are purchasing gray market products, particularly with items such as soaps and detergents where gray market products often differ from the authorized products? If not, why not?

A. See answer to question No. 5 posed by Senator DeConcini. K mart does not purchase soaps and detergents.

4. Q. Do you discount the sale price of the authorized products that you sell? If so, by how much?

A. K mart generally sells any product at a discount from the suggested or prevailing prices. The amount of the discount varies from product-to-product depending upon circumstances affecting the particular product category and mix at K mart.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILE COPY

K MART CORPORATION,
Plaintiff,
v.
RACHEL PERRY, INC.,
Defendant

Civil Action No.
83-CV-4784-DT

Hon. Anna Diggs Taylor

JUDGMENT AND ORDER

The parties hereto having entered into a Stipulation and Order dated September 5, 1985, to dispose of this action;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The parties are directed to comply with the terms of said Stipulation and Order;

2. The claims asserted by K mart Corporation against Rachel Perry, Inc. are hereby dismissed with prejudice and without costs; and

3. The Court shall retain jurisdiction of this action for the purpose of construing and enforcing said Stipulation and Order.

Entered this 5th day of September, 1985.

United States District Judge

FILE COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

K MART CORPORATION, Plaintiff, v. RACHEL PERRY, INC., Defendant	Civil Action No. 83-CV-4784-DT Hon. Anna Diggs Taylor

STIPULATION AND ORDER

WHEREAS, on November 2, 1983, K mart filed a complaint in the United States District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 83-CV-4784-DT, which named Rachel Perry, Inc. as a defendant and alleged violations of Section 1 of the Sherman Act, other statutes and common law torts;

WHEREAS, extensive depositions and documentary discovery have been taken in the case and plaintiff has obtained evidence in support of its case; and

WHEREAS, it is the desire and intention of the parties to effect a full and final disposition of this matter;

NOW, THEREFORE, and in consideration of the mutual promises hereinafter set forth, the parties do hereby stipulate and agree as follows:

FACTUAL BACKGROUND

1. Plaintiff K mart Corporation ("K mart") is a corporation organized under the laws of the State of Michigan and has its principal place of business at Troy, Michigan. K mart is engaged in interstate commerce. K mart operates a chain of discount department stores in Michigan and throughout the United States where consumers can purchase brand-name merchandise at a substantial savings over the retail prices suggested by manufacturers. K mart is known nationally as "The Saving Place" where the consumer can obtain "quality at a K mart price."

2. Defendant Rachel Perry, Inc. ("RPI") is a corporation organized under the laws of the State of California and has its principal place of business at Canoga Park, California.

3. RPI manufactures and markets a line of natural skin care, body care and makeup products. Such products are sold by RPI in interstate commerce to distributors and retailers throughout the United States, including the State of Michigan, and abroad.

4. During the time period 1980 through 1983, K mart purchased RPI products for sale in its stores, including 22 stores within the Eastern District of the State of Michigan, from wholesale distributors, including Tree of Life West, Canoga Park, California, and Midwest Natural Foods, Inc., Ann Arbor, Michigan. On or about June 7, 1983, the then Executive Vice President of RPI sent a letter to "ALL RACHEL PERRY DISTRIBUTORS" stating:

> Unacceptable to Rachel Perry, Inc. is the placement of Rachel Perry Products in "discount stores," as a class of trade. Specifically, this includes mass merchandisers such as K-mart. It is contrary to our marketing program to have the Product Line appear in such an environment. If it is learned that Rachel Perry Products are included in "discount store sets," the possibility of termination exists.

5. The foregoing letter was sent after RPI had received complaints from retailers about K mart's discounting of prices on the Rachel Perry Line.

6. Coincident with the foregoing letter, RPI told Tree of Life West that it would be terminated as a distrbutor of RPI products because it was selling to K mart. Tree of Life West told RPI that Tree of Life West had informed K mart that Tree of Life West would refuse to sell RPI products to it. An officer of Tree of Life West testified that Tree of Life West would not to sell K mart because:

> Rachel Perry is one of the best known lines in the industry, and without the line . . . it would definitely force customers that deal with us to go elsewhere.

Thereafter, shipments of RPI products to K mart stores from Tree of Life West were terminated. An RPI memorandum dated September 2, 1983, directed RPI sales personnel to check stocks of RPI products in K mart stores. Such memorandum commented that it is our "understanding" that K mart stocks should be decreasing.

7. During the aforesaid time period, RPI provided retailers of RPI products with price sheets showing specific "wholesale" and retail prices for RPI products. RPI advised retail accounts that "most chains" would "sell at full suggested retail" and urged potential customers to obtain a "full 55%" profit on the sale of RPI products. To this end, RPI representatives "discussed" pricing with retailers so that both parties could "make the profit that is achievable." An RPI business presentation (given to all United States distributors) describes RPI products as "a high quality, high priced skin care line targeted towards quality conscious health food consumers." A then RPI Vice President told Midwest Natural Foods, Ann Arbor, Michigan, that Midwest should not sell to K mart, because Rachel Perry was trying to achieve a "high price point image." That same executive wrote to another account, "Rachel Perry, Inc. does not agree with the concept of

heavily discounting the products in their advertising." A study conducted for RPI by a third party consultant also noted:

> In addition, placement is occurring in heavy discounters such as K mart, which again is contrary to corporate goals.

8. During the time period when K mart purchased RPI products, that company had a cooperative advertising program wherein it paid money for cooperative advertising directly to retailers. The amounts of the promotional allowances which RPI made available to other retailers handling goods of like grade and quality as K mart were often substantial during this time period, i.e., $50,000 to People's Drug Stores, $38,000 to Thrifty Drug, $10,000 to Gray Drug Fair, and an offer (based on projected sales) of $141,000 to the Jack Eckerd Co. Similarly, RPI made substantial promotional services such as demonstrations available to other retailers during this time period. A witness has testified that RPI did not make promotional or cooperative monies or promotional services available to K mart.

9. RPI agrees that a joint collaborative effort precluding a price discounter from obtaining RPI products from distributors in order to fix, set, or influence resale prices constitutes a conspiracy in per se violation of Section 1 of the Sherman Act (15 U.S.C. §1).

RELIEF

1. RPI shall not enter into, or act pursuant to, any agreement, combination or conspiracy to fix, set or influence the resale prices of RPI products.

2. RPI shall not request, suggest or require its distributors to discontinue sales of RPI products to K Mart Corporation.

3. RPI shall offer and affirmatively make available to K Mart Corporation promotional allowances or services in connection with the resale of RPI products on terms which are proportionately equal to those offered to other purchasers of RPI products.

4. RPI shall forthwith withdraw its letter TO ALL RACHEL PERRY DISTRIBUTORS dated June 7, 1983 and shall send by certified mail a copy of Exhibit A attached hereto to all of its distributors.

5. RPI shall pay the sum of $275,000 to K mart Corporation.

6. K mart Corporation releases and discharges RPI, its affiliated companies, and their successors, assigns,

indemnitors, officers, directors, employees, and agents from any and all claims, damages, and causes of action (including, but not limited to, any and all claims asserted or that might have been asserted in this lawsuit) that K mart Corporation has against RPI, whether or not now known.

7. This Stipulation and Order is entered into by the parties for the sole purpose of compromising and settling disputed claims and to avoid the burden and expense of litigation. RPI expressly reserves the right to dispute in any other proceeding that it has violated any law.

8. K mart Corporation will dismiss the instant action with prejudice and without costs.

9. RPI and K mart agree that the Court shall retain jurisdiction for purposes of construing and enforcing this Stipulation and Order.

This 5th day of September, 1985

K MART CORPORATION

By: Roger E. Davis

RACHEL PERRY INC.

By: Rachel Perry

9142x

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the foregoing Stipulation is approved and the parties thereto are directed to comply with its terms;

IT IS FURTHER ORDERED that the claims asserted by K mart Corporation against Rachel Perry, Inc. HEREBY ARE DISMISSED, with prejudice and without costs; and

IT IS FURTHER ORDERED that the Court shall retain jurisdiction of this action for the purpose of construing and enforcing the foregoing Stipulation.

Entered this 9th day of September, 1985.

ANNA DIGGS TAYLOR

United States District Judge

A TRUE COPY

BY

TO ALL RACHEL PERRY, INC. DISTRIBUTORS

______ __, 1985

Re: K mart v. Rachel Perry, Inc.

Rachel Perry, Inc. announced this morning that it had entered into a Stipulated Consent Order settling the treble damage antitrust action which K mart Corporation had initiated against it in the United States District Court for the Eastern District of Michigan.

The Settlement involves the entry of a Consent Order which will prohibit Rachel Perry, Inc. from any agreement or conspiracy to fix, set or influence resale prices, or to prevent its wholesale distributors from selling to K mart Corporation. The Order further provides that Rachel Perry, Inc. will not discriminate in promotional allowances and services allowed to K mart Corporation in connection with the purchase of its merchandise, and that Rachel Perry, Inc. will make all promotional allowances and services available to K mart on proportionally equal terms.

The Order further provides that Rachel Perry, Inc. shall pay the sum of $275,000 to K mart Corporation to settle claims

EXHIBIT A

that Rachel Perry, Inc. has engaged in agreements, combinations and conspiracies to fix resale prices and to prevent K mart Corporation from obtaining such Rachel Perry, Inc. products.

Rachel Perry, President of the company, stated that the company had no desire to engage in questionable conduct and that it was advising all of its distributors that it had cancelled its previous distribution policy statement of June 7, 1983.

Consumers Union
Publisher of Consumer Reports

April 30, 1990

Honorable Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached for the record of the April 4 hearing on S.626 are my responses to additional questions submitted to me in writing by yourself, Senator Hatch and Senator Grassley. I appreciate the opportunity to have testified and hope that these responses will contribute to the record.

Sincerely,
Mark Silbergeld
Mark Silbergeld
Director,
Washington Office

Washington Office
Suite 520, 2001 S Street, Northwest · Washington, D.C. 20009 · (202) 462-6262

RESPONSES OF MARK SILBERGELD, DIRECTOR, WASHINGTON OFFICE
CONSUMERS UNION OF UNITED STATES, INC.
TO WRITTEN QUESTIONS SUBMITTED BY
CHAIRMAN DECONCINI, SENATORS HATCH AND GRASSLEY

1. Q. What hard evidence do you have that by eliminating the importation of gray market goods there will be a significant inflationary effect? Isn't it true that since the gray market car bill was enacted, the relative increase in prices of Mercedes, for example, has declined? (Chairman DeConcini, Senator Hatch)

A. It is not possible to have "hard" evidence at to what would happen under conditions that do not exist. In order to obtain hard evidence as to price behavior under a ban on parallel imports, we would have to implement such a ban, then measure the price movement of each good in question using a sophisticated econometric model that holds all other price-influencing factors constant. Therefore, predicting prices under circumstances that could exist in the future is based on past experience. In this instance, the relevant experience is supply reduction. It is universally accepted that significant limitations on supply, relative to demand, result in higher prices. That is a basic "law" of economics. While Congress can repeal the laws it passes, it cannot effectively repeal the laws of economics. With respect to the price of cars since the gray market car bill was passed, it must be noted that many factors affect the prices of cars (and other goods) in addition to parallel imports. The auto industry in general is undergoing a recession. Recession is a powerful price-leveler. It is not surprising, therefore, if the prices of Mercedes have increased recently at a slower rate than during some previous period of measurement.

2. Q. How would you propose to deal with the problem created for consumers by parallel products that differ from authorized goods but the differences are not covered by existing laws, e.g., where gray market soap has too little hexachlorophene or where gray market toothpaste has too much fluoride? (Chairman DeConcini, Senator Hatch)

A. Where there is a health-based reason to keep the product out of the U.S., there either is or should be an FDA standard. Customs should detain and FDA act against products identified by the foreign trademark holder as violating the FDA standard. Proponents of S.626 have argued that FDA is not doing or cannot do its job in this respect. Before the Committee takes any further action on S.626, it should hold a hearing to obtain information from and about FDA on this issue. Where there is no health reason for keeping a product out of the U.S. but the trademark holder alleges different customer preferences here and abroad, the trademark holder already has, as the Chairman pointed out at hearings, ample opportunity to distinguish production for the U.S. market from production for other markets by variation in trade dress. Variations in trade dress do not require use of a different trademark. They only require differentiatable packaging. It would be very interesting for the Committee to know whether the trademark holders who assert arguments regarding the commercial infeasibility of varying trade dress would recommend that U.S. travelers abroad avoid buying their products because of these differences. It would also be very important for the Committee to know whether from trademark holders seeking protection under S.626 which of the products they distribute abroad threaten the health or safety of U.S. consumers.

3. Q. What evidence do you have that discounted gray market products (for example, electronic products) sell for less that discounted authorized products? (Chairman DeConcini, Senator Hatch).

A. The assertions of the retailers of parallel-imported goods. However, this assertion is economically intuitive. The arguments to the contrary are counter-intuitive, hence should bear the greater burden of proof. It was notable at the hearing that when COPIAT witness Edley offered a single of example to support his argument to the contrary, COPIAT witness DeMuth indirectly countered that assertion by noting that there are differences going both ways, hence statistically insignificant surveys are not proof of general price levels. If the Committee is wont to believe that the generally accepted laws of economics may not apply in these markets, it should obtain a price survey from the General Accounting Office that is based on a statistically adequate sampling. The Committee should also note, however, that the difference between the prices of the authorized and parallel imports of identical goods is not the only price effect of parallel imports. Because of the competitive nature of retailing, the average price of the authorized import should be lower than it would be without parallel goods competition, even in instances where the prices of the two goods are identical. Of course, this assertion has the premise that supply relative to demand affects price. If the Committee doubts this widely-held, very basic underlying economic assumption, we would welcome a hearing featuring prominent economists who are not employed by any party commercially interested in S.626.

4. Q. Would you favor a change in the law whereby a manufacturer would have to sell to a retailer regardless of the retailer's past questionable business practices? (Senator Hatch)

A. No. However, there is a great difference between refusals to deal and the situation involving parallel imports. First of all, agreements to refuse to deal and anticompetitive refusals to deal are unlawful and should remain so. Second, the right unilaterally to refuse to deal in many instances *is* lawful and should remain so. But this right is very different from the per se right to impose restraints on alienation past first sale. That is the right S.626 would impose and we do not favor such a right.

5. Q. If imported goods violate United States law (such as health or safety standards), aside from any gray market issue, is it already illegal to import such goods into our country? (Senator Grassley)

A. Yes. Title 21 U.S.C. §381 gives the Departments of Health and Human Services and Treasury what appears to be ample authority to deal with importation of unapproved drugs and adulterated or misbranded foods, drugs, cosmetics and medical devices. If it is the contention of proponents of S.626 that FDA has not an adequate job under that authority, the Committee ought to call FDA before it to air out this allegation. However, banning all parallel imports, even those that do not fall under FDA's jurisdiction, simply because FDA is not utilizing this provision of law effectively would seem to throw out both the baby and the bathtub with the dirty bath water. The Committee has yet to obtain documentation that there is a problem with FDA failing to enforce existing product standards with respect to imports.

UNIVERSITY OF CALIFORNIA, SANTA BARBARA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF ECONOMICS SANTA BARBARA, CALIFORNIA 93106

April 29, 1990

Senator Dennis DeConcini
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Attention: Cecelia Swensen

Dear Senator DeConcini:

Attached for the hearing record on S. 626 are my responses to the additional written questions. I appreciate the opportunity to include these answers in the record.

Thank you very much for the courtesy you have shown me.

Sincerely,

William S. Comanor
Professor of Economics

WSC:crc

RESPONSES OF PROFESSOR WILLIAM S. COMANOR, DEPARTMENT OF ECONOMICS, UNIVERSITY OF CALIFORNIA, SANTA BARBARA TO WRITTEN QUESTIONS SUBMITTED BY SENATOR DeCONCINI

9. Q: Did the Reagan FTC have a written policy at the Commission or Commissioner level on the parallel import problem? If yes, could you please provide a copy of such position paper.

A: The FTC staff report mentioned in my testimony, which supports parallel imports, was consistent with FTC policy while I was at the Commission in the latter 1970's. The Committee would have to inquire directly of the FTC as to any specific pronouncements of individual Commissioners or the Commission as a whole.

10. Q: Have you yourself developed any empirical data that gray market goods have lower prices than discounted authorized goods? What is your data to support this position, and where does it come from?

A: I have reviewed available information and empirical data including that provided to the Committee in my testimony of April 4, 1990. I have not conducted any independent price surveys. However, I have reviewed this matter with representatives of discount retailers who report that price differentials up to 30% to 40%

are commonly found. Such differentials are supported by the evidence on Seiko watches reported in the table attached to my written testimony.

11. Q: Consumers often don't know an item they are buying is gray market. These products may not be subject to the same quality control or warranties and may even be made from different ingredients than the U.S. product. Resulting customer dissatisfaction can cause substantial harm to the reputation and goodwill associated with the U.S. trademark. Shouldn't the U.S. trademark owner be entitled to some protection from such harm to its trademark?

A: Most imported trademarked products are identical, regardless of the importer. They are manufactured in the same facilities and in the same manner. However, in some circumstances, it may be that the same item produced for foreign consumption is somewhat different than that produced for consumption in the United States. Generally, products produced for foreign consumption are not better or worse but merely different. When introduced into the United States market, some American consumers may prefer the product designated for foreign consumption although some may not. Therefore, on the basis of product characteristics alone, consumer satisfaction may increase in some cases even though it may decline in others.

More important, one should not divorce questions of consumer satisfaction with a product from the price charged for it. Parallel imports are generally sold at much lower prices than those set by authorized importers. Even if these products were less preferred than their authorized counterparts, when prices are the same, consumers may well prefer the alternate products when it is sold at a much lower price. Indeed, competitive markets frequently provide consumers with the choice between higher quality, higher priced items and lower quality, lower priced alternatives. Parallel imports contributes to the availability of such choices.

Where the consumer products in question are subject to repeat buying, such as with perfumes or toilet water, consumers quickly learn about any product differences and are able to determine whether such differences are worth the evident differences in price. In this case, the rapid diffusion of consumer information assures that the authorized U.S. trademark holder will suffer no inappropriate losses due to the presence of competitive products. Any losses experienced are those expected in a competitive market. On the other hand, products are less frequently purchased, there may be greater disadvantage to the U.S. trademark holder; but this is a disadvantage which can be countered through appropriate advertising campaigns that point out any differences between the product sold by authorized and parallel importers. In that case, and with this information, consumers can decide whether any product differences are worth the differences in price.

The critical issue here is that one cannot determine questions of product differences or product qualities independent of price.

RESPONSES TO QUESTIONS SUBMITTED BY SENATOR HATCH

1. Q: It is my understanding that the Reagan Administration never developed a final position on the gray market issue and that different parts of the administration had different views. Do you have any information to the contrary?

A: Please see the answer above to Question 9 posed by Senator DeConcini.

2. Q: Did the Reagan FTC have a policy at the Commission or Commissioner level on the gray market issue?

A: Please see the answer above to Question 9 posed by Senator DeConcini.

3. Q: Please share with the subcommittee any empirical data that you have developed to show that gray market goods have lower prices than discounted authorized goods.

A: Please see the answer above to Question 10 posed by Senator DeConcini.

Senator DeConcini. That concludes our hearing today. The committee will stand in recess, subject to call of the Chair.

[Whereupon, at 3:46 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

AAMA
AMERICAN AMUSEMENT MACHINE ASSOCIATION

April 5, 1990

Honorable Dennis DeConcini
Chairman
United States Senate Sub-Committee on Patents, Copyrights and Trademarks
SH-327 Hart Senate Office Building
Washington, D.C. 20510-0302

Dear Chairman DeConcini:

I am writing to you on behalf of the membership of the American Amusement Machine Association, who wholeheartedly support S.626, the bill that would require the United States Customs Service to prohibit grey market goods from entering the United States.

Members of our trade association have lost millions of dollars over the years to grey market games entering U.S. commerce. I would like to point out that the American consumer is greatly deceived by grey market video games since he pays hard-earned dollars to play games that are not the "real thing". Further, the importation and operation of grey market games does not help the American consumer since the operator of grey market video games charges the same price - a quarter - to play. The consumer sees no benefit and only the operator benefits at the expense of the legitimate American game maunfacturers and distributors.

The importation of grey market games severely harms the American video game business and results in the loss of American jobs. Companies in our association manufacture cabinet monitors, wiring harnesses, joysticks, coin acceptors, and graphics - all made in the United States. Additional AAMA members spend millions of dollars every year on research, development, and marketing of their products. Research and development costs alone may exceed $1,000,000.00 per game. Grey marketeers have none of these expenses and threaten U.S. research and development by siphoning off sales without spending a cent to develop the product.

As a result of our internal investigtions conducted by a former F.B.I. agent now employed by AAMA, it has been determined that there is a direct link between the importation of counterfeit goods and grey market goods.

In summary, the manufacturers, distributors, and associate members of AAMA urge Congress to take all necessary steps to prevent the importation of grey market merchandise and stop this fraud against the American public.

Sincerely,

Gilbert G Pollock

Gilbert G. Pollock
President

cc: Bob Fay

12731 Directors Loop • Woodbridge, Virginia 22192 • Telephone (703) 494-2758 • FAX (703) 494-0616

American Ski Federation
207 Constitution Avenue, N.E.
Washington, D.C. 20002

202/543-1595

Representing the Interests of American Skiing

TESTIMONY BY

JOSEPH PRENDERGAST

PRESIDENT, AMERICAN SKI FEDERATION

ON S. 626 TRADEMARK PROTECTION ACT OF 1989

BEFORE THE

SUBCOMMITTEE ON PATENTS, COPYRIGHTS, & TRADEMARKS

COMMITTEE ON JUDICIARY

UNITED STATES SENATE

APRIL 4, 1990

Dear Mr. Chairman:

The gray market is of serious concern to the ski industry across the United States. The ski industry supports S. 626, the Trademark Protection Act of 1989, a bill which deters the gray market and protects the current product distribution system in the United States. Our concerns are primarily based on the propensity for consumer confusion and product reputation.

Confusion arises with gray market items because it is difficult to distinguish between a gray market product, which is intended for sale abroad, and the product manufactured overseas but made for American distribution. Generally, in our industry, the made for U.S. product itself is not significantly different than the foreign product, but the U.S. product includes service which is expected by the U.S. consumer and provided by our manufacturers through a refined product distribution system.

A ski product made for U.S. distribution is sold through retailers who have employees specially trained by the ski manufacturer to fit and tune the ski, boot, or binding specially for each customer's needs. Ski equipment improves and technical aspects of the product change annually. Because selling the proper equipment to our consumers is critical to the success and safety of our industry, our manufacturers send representatives to work and train employees at the retail shops which sell their products. Stores which sell gray market items do not have the benefit of the manufacturers training programs and often end up selling products which are not suitable for the customer considering his level of skiing expertise and size. The ski industry believes that proper ski equipment is necessary for a good, safe, and repeated ski experience. In this era of litigation, product liability has become an issue. If the proper ski is sold, the industry is less likely to find itself in a costly product liability lawsuit. A skier who has bought a gray market ski is usually unaware that the ski is inappropriate, the binding has been mounted or adjusted incorrectly, and that the retailer was unauthorized by the manufacturer. If an American chooses to buy his ski equipment overseas, where it might be sold more cheaply, he knows that the gear does not have the intangible U.S. consumer stamp of approval. If he buys it in the United States he assumes it does.

A second consumer issue is that ski products not made for the United States are covered by a foreign factory warranty. Generally a European ski needs to be sent directly back to the manufacturer in Europe. A problem with the made for U.S. ski would generally be handled by the U.S. retailer, and can be because the manufacturer has invested substantially into the specialty retail shops he has chosen to sell his products through. The gray market consumer usually does not realize that the gray market retailer will not be able to take care of a problem he may have with his purchase. The negative feeling which is generated when the American customer takes the purchase back expecting service or replacement or other service and discovers his purchase is not covered is of serious concern to our manufacturers who have worked to develop good will and good reputation. These incidents are extremely damaging to our companies sales and reputation in the united States. Our companies have invested significant resources to insure consumer satisfaction.

A primary argument in favor of the gray market is that items can be sometimes be purchased for a lower price than those sold through the authorized distribution system. This is true in some cases because of the higher cost and care taken in the distribution of ski equipment in the United States, all the way from loading the product into the truck to the adjustment of the binding after the ski has been purchased. The ski industry believes that the American product distribution system insures superior service and is more in line with the safety needs and expectations of the American consumer.

The ski industry believes that there is another issue of fairness involved. Should the gray marketer be profiting from the good reputation and service which the responsible American distributor provides and financially supports? This service and customer responsibility represents a significant expense for the American distributor. To compete with the gray marketer, the U.S. retailer could decrease the customer service and benefits currently provided. The consumer may benefit in the short term cost cuts, but in the long run we know the consumer will lose, whether it is a simply a broken ski or worse a broken leg. No longer will the manufacturer be able to afford sending trained personnel across the [illegible], or will he be able to provide product service if he must compete with the gray market.

In summary, the gray market poses a threat to consumers, small business, and the authorized distribution system of goods in the United States. If the gray market is allowed to thrive in the United States, costs will prevent authorized American retailers to continue to provide the good service they have historically provided the American consumer in order to cut expenses and compete with gray market. We hope your committee will support S. 626 its passage will benefit both the consumer and our small businesses. Thank you for holding hearings on this issue of critical interest and concern to us.

Distilled Spirits Council of the United States, Inc.

April 27, 1990

The Honorable Dennis DeConcini
Chairman, Subcommittee on Patents,
  Copyrights & Trademarks
Senate Judiciary Committee
327 Hart Senate Office Building
Washington, D.C. 20510-6286

Re: April 4, 1990 Hearing on S.626 Before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks

Dear Mr. Chairman:

On behalf of the Distilled Spirits Council of the United States, Inc. (DISCUS), a national trade association representing the producers and importers of over 90% of the distilled spirits sold in the United States, we commend your sponsorship of and urge the Subcommittee's full support for S.626, the Trademark Protection Act of 1989. This bill would amend the Lanham Trademark Act to expressly prohibit the importation into or sale in the United States of gray market imports, absent the consent of the United States trademark owner and without regard to what corporate affiliation the trademark owner may have overseas. In doing so, the bill would bring United States policy concerning gray market imports into accord with the purposes and principles of the United States trademark system, to the benefit of American industry, American labor and the American consumer.

As a member of the Board of Directors of the Coalition to Preserve the Integrity of American Trademarks (COPIAT), we fully support and endorse the testimony of Christopher Edley, Jr., President of COPIAT, that was presented at the April 4, 1990 hearing on S.626. We respectfully request that our comments be included in the record of that hearing.

Gray market imports "free ride" on the goodwill and product recognition built by U.S. trademark owners over a number of years at significant cost. These same gray market imports take jobs away from U.S. workers. Many authorized goods that compete with gray market goods are manufactured in the U.S. from start to finish. In other instances authorized goods that compete with gray market goods are packaged in the U.S., using U.S. bottles, U.S. boxes, and other U.S.-manufactured supplies. In each instance, the sale of a gray market good represents a loss for U.S. labor. Gray market goods also decrease the incentive for U.S. trademark owners to spend money on advertising and services,

1250 EYE STREET, N.W., SUITE 900   WASHINGTON, D.C. 20005   (202) 628-3544
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and for competitors to produce competitive products in this country. In both cases, U.S. industry and labor suffer. Gray market goods also confuse and deceive U.S. consumers who often do not realize that gray market goods are being sold outside authorized distribution channels and are not intended for the U.S. market or do not meet U.S. standards.

S.626 remedies the current vagaries and ambiguities in U.S. enforcement against gray market imports by fulfilling the fundamental purposes of our intellectual property system.

The protection of the investment and the goodwill created by a U.S. trademark owner should not be dependent upon how that company is organized. The rights of an independent, or a foreign-owned or controlled U.S. trademark owner warrant the same treatment. Each type of company spends millions of dollars in the United States to promote and advertise its trademarked product. There is no substantive reason to protect one type of company, but not another, against gray market imports that deprive U.S. trademark owners of their investment in their trademark. Gray market importers do not make this investment. They "free ride" on the goodwill and product recognition created by a U.S. trademark owner irrespective of its corporate structure.

S.626 articulates a cohesive national policy against gray market and ensures our ability to maintain a vital and competitive economy. DISCUS strongly supports S.626 because gray market imports must be prohibited in order to preserve the integrity of our trademark system and to protect U.S. industry, labor and consumers from the detrimental impact of this unfair competition.

Sincerely,

F.A. Meister

F.A. Meister
President/CEO

FAM:wd

DURACELL INC.

Berkshire Industrial Park • Bethel, CT 06801 USA
Telephone 203-796-4158 • Fax 203-796-4269

Gregg A. Dwyer
Senior Vice President
and General Counsel

April 10, 1990

The Honorable Dennis DeConcini
SH-328 Hart Senate Office
Building
Washington, D.C. 20510

Dear Sir:

Duracell Inc. ("Duracell") submits these comments in support of S. 626. By prohibiting the importation of gray market goods bearing United States trademarks, this bill provides much needed relief for Duracell and other U.S. companies plagued by the presence of these unauthorized products in the U.S. market.

Duracell is a Delaware corporation with its principal place of business in Bethel, Connecticut. It is the leading manufacturer of alkaline household batteries, the vast majority of which are sold in the popular consumer sizes: AA, AAA, C, D and 9-volt. These batteries are marketed under the well-known DURACELL trademark. Hundreds of millions of dollars have been spent to develop the goodwill underlying the DURACELL mark in the United States. Duracell employs approximately 4,000 persons in the United States to manufacture, market and distribute domestic alkaline batteries. Our U.S. plants are located in South Carolina, North Carolina, Tennessee and Georgia.

Duracell has a number of foreign affiliates and subsidiaries which manufacture DURACELL alkaline batteries. All of these batteries are intended to be distributed in the foreign markets served by these affiliates and subsidiaries. None of these foreign batteries are intended for distribution in the United States. Even though Duracell does not sponsor or authorize the importation or distribution of any foreign DURACELL batteries in the United States, substantial quantities of foreign DURACELL batteries have been imported into this country. Taking advantage of currency arbitrage from time to time, as well as the well-known DURACELL mark, gray marketeers have sold hundred of millions of foreign DURACELL batteries in the United States. In short, gray marketeers have taken a free ride on Duracell's huge U.S. marketing investment.

Faced with unlawful competition in the United States from gray market imports of DURACELL batteries intended for sale abroad, Duracell has engaged in difficult, expensive and time-consuming legal proceedings. Duracell has sought relief from the U.S. Customs Service, the federal district courts and the U.S. International Trade Commission ("ITC"). In a lengthy, well-reasoned opinion, the ITC found such imports to infringe Duracell's trademark in violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337). The ITC specifically determined that consumers do not benefit from the presence of the gray market product in the U.S. market. Although some gray marketeers sell foreign DURACELL batteries to Duracell's trade customers at prices below Duracell's prices to these customers, the ITC investigation revealed that both products are sold to U.S. consumers at substantially the same price.

As the ITC recognized, gray market imports harm Duracell and U.S. consumers by causing confusion and deception in the marketplace. Although foreign and domestic DURACELL batteries are both of high quality at their point of manufacture, foreign DURACELL batteries are subject to the risk of quality deterioration through mishandling and uncontrolled environmental exposures during shipment to the United States. This can result in an inferior product at the time a consumer purchases it. Additionally, many foreign DURACELL batteries sold in this country are in foreign language packaging, and, thus, do not contain in English the important cautionary statements printed on Duracell's packaging, all of which are intended to prevent property damage or personal injury to the U.S. consumer. Resulting consumer dissatisfaction is, of course, directed to Duracell, because generally consumers do not understand the manner in which the imported products reached the United States. Duracell has suffered, and continues to suffer, from the presence of gray market alkaline batteries in the U.S. market.

President Reagan did not impose the relief granted to Duracell by the ITC because of the then-prevailing conflict with the Customs Service regulations governing gray market imports. S. 626 is important, because it provides an opportunity to state clearly through legislation the U.S. policy regarding gray market importations. For U.S. companies like Duracell who continue to be affected by gray market imports, S. 626 provides a vitally-needed single solution to the problem. We urge its prompt passage.

Very truly yours,

DURACELL INC.

Gregg A. Dwyer
Senior Vice President
and General Counsel

GAD/jmj

STATEMENT OF GEORGE T. EISENBERG
SENIOR EXECUTIVE VICE PRESIDENT
HEUBLEIN, INC.

Comments on S.626 Held Before the Sub-Committee and Patents, Copyright and Trademarks Committee on the Judiciary United States April 4, 1990.

My name is George T. Eisenberg. I am Senior Executive Vice President of Heublein, Inc. ("Heublein"). Heublein is a Connecticut Corporation which does substantial business in the United States and overseas. Heublein is the producer of Smirnoff Vodka, Black Velvet Canadian Whiskey, Jose Cuervo Tequila and imports numerous wines and spirits products. Heublein has been in the alcoholic beverage business since 1891, and I have been associated with Heublein for some 20 years.

In my capacity as Senior Executive Vice President of Sales and Marketing, I am uniquely qualified to comment on S.626. S.626 and the elimination of the grey market that it would help to accheive is strongly supported by myself and Heublein, Inc.

As a large advertiser of our trademarked distilled spirits and wine products, we feel that we will continue to be severely damaged by those entities who want to unfairly "grey market" products which are similarly branded. These free riders, if you will, have diluted our million dollar advertising and promotion programs and continue to injure the reputation of Heublein's products.

For this and other reasons, I, on behalf of Heublein, Inc. express our support of S.626.

Respectfully submitted,

George T. Eisenberg

George T. Eisenberg
Senior Executive Vice President
Heublein, Inc.

Hiram Walker & Sons Inc.

P.O. BOX 33006, DETROIT, MICHIGAN 48232-3006 TELEPHONE (A.C. 313) 965-6611

SENIOR VICE PRESIDENT & GENERAL COUNSEL

April 30, 1990

Senate Subcommittee on Patents,
Copyright and Trademarks
Committee on the Judiciary
United States Senate

Re: Hearings on Senate Bill 626

Gentlemen:

We fully support Senate Bill 626.

The imported alcohol beverage business will continue to be severely and unfairly damaged by those in the gray market business who only selectively import our finest and most popular brands. We spend millions of dollars on advertising and promoting our products and brands and have built up goodwill and consumer acceptance over years of advertising and promotion. Canadian Club and Kahlua are two Hiram Walker brands that have been built up over a long period of time.

"Free riding" is presently permitted by gray marketers because of the United States Customs Service's peculiar interpretation of Section 526 of the Tariff Act of 1930. Even though, it is unlawful to import foreign products bearing U.S. registered trademarks without the consent of the U.S. trademark owner, for over twenty years, Customs has refused to enforce this provision except where a U.S. trademark owner is not owned by or affiliated with foreign owners of the same trademark.

It is our view that the Customs Service cannot justify the distinction between United States and foreign owned corporations with regard to the protection of trademark rights at the border. The Government gives full rights to a corporation's real estate, stock certificates or bank deposits when it is an independent U.S. company or one that is foreign owned or controlled. The same treatment should be given to trademarks.

The Customs' attitude is especially disturbing in light of the aggressive position of the U.S. Government around the world regarding its protection of intellectual property rights which include trademarks.

Gray marketers are not concerned about the label and presentation of the product they import as long as the well known brand name is easily seen by the consumer. Many times, overprinting of the label appears and the product is given the appearance of sloppy labelling in order for the gray marketer to satisfy the mandatory label requirements of the Bureau of Alcohol, Tobacco and Firearms. Any noticeable difference between the gray market product and that brought in through an authorized importer only confuses, deceives and disappoints the consumer who has been buying the product for years with the same expectation of quality, consistency and genuineness.

We support Senate Bill 626 because it is essentially a "demarking" statute because the Bill would provide that, absent the consent of a U.S. trademark owner, no person may import into or sell within the United States any good that is manufactured outside the United States "if that good, or any label, sign, print, package, wrapper or receptacle intended to be used upon or in connection with the sale, offering for sale or distribution of that good" bears a trademark that is either identical or substantially similar to a registered trademark owned by a citizen of the United States or a corporation or other entity created under the laws of the United States.

In the imported alcohol beverage sector, this would mean the complete removal of the trademark or protective label design from the bottle and would require the removal from all packaging and boxes accompanying the bottle and meant for consumer consumption.

It is important and only fair to note that this would not prohibit the importation of goods manufactured abroad bearing U.S. trademarks. It would simply not allow those goods to be imported unless those trademarks had been removed in a permanent way.

We urge your support of Senate Bill 626.

Very truly yours,

HIRAM WALKER & SONS, INC.

Richard M. Kippen

Richard M. Kippen/c
Senior Vice President and General
Counsel

Johnson & Johnson
CONSUMER PRODUCTS, INC.

SKILLMAN, NJ 08558-9418

April 27, 1990

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator DeConcini:

A JOHNSON & JOHNSON representative attended the April 4 hearing on S. 626, the Trademark Protection Act of 1989. At the hearing, opponents of the legislation reportedly belittled the health and safety risks associated with gray market imports. In light of its own extensive experience with such problems, JOHNSON & JOHNSON finds this attitude puzzling.

Our company manufactures and markets in the U.S. some of the most recognized baby products. None of them are imported. We have recently won a court decision against a distributor of counterfeit JOHNSON's Baby Shampoo (Exhibit 1). The FDA recently had a Class II and Class III recall of diverted JOHNSON's Baby Shampoo (Exhibit 2). We have a long history of U.S. Customs detention of misbranded baby products using our trademarks and arriving from unknown sources (Exhibit 3). We can not assure the source and therefore the safety of many of these products.

In short, JOHNSON & JOHNSON is intimately acquainted with the potentially serious health and safety risks posed by the gray market. While the company has received assistance in combatting these problems from the courts, the FDA, and the U.S. Customs Service, additional laws are necessary. That is why we strongly support the enactment of the legislation which you have co-sponsored.

We appreciate this opportunity to comment on the testimony from your hearing.

Yours truly,

Bruce Semple

Bruce Semple, M.D.
Director
Medical and Regulatory Affairs

ls/2459A

Attachments

EXHIBIT 1

COUNTERFEIT JOHNSON'S BABY SHAMPOO

JOHNSON & JOHNSON Baby Products Company
v. Product & Development Trading Corp.

Decision: March 30, 1990 (Exhibit 1)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JS-6
[illegible] NO. 124
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JOHNSON & JOHNSON, and
JOHNSON & JOHNSON BABY
PRODUCTS COMPANY,

Plaintiffs,

- against -

PRODUCT & DEVELOPMENT TRADING
CORP., PETER BRONNER,
CABRAMARTY S/S IMPORTACAO E
EXPORTACAO, TRADEMA INTERNATIONAL
CORP., WOLF BRAJTMAN,
AEC TRADING COMPANY, LTD., and
SAM KISLIN,

Defendants.

[illegible] Civ. [illegible] (VLB)

ORDER

VINCENT L. BRODERICK, U.S.D.J.

This case arose out of the efforts of two entrepreneurs to make money importing, and then distributing baby shampoo bearing the name of Johnson & Johnson. The shampoo they imported was counterfeit, and failed to live up to Johnson & Johnson's promise that their baby shampoo would cause "no more tears." Faced with consumer complaints, plaintiffs expended considerable time and resources tracing and retrieving the product which was sold under Johnson & Johnson's trademark and trade dress. They filed this lawsuit against those responsible for the importation and distribution of the counterfeit product.

Plaintiffs seek damages pursuant to the Lanham Act for trademark infringement and false designation of origin. 15 U.S.C. §§1114, 1116, 1117, and 1125. They also assert claims for trademark infringement under the laws of the State of New York, and under the common law. Plaintiffs seek both injunctive and monetary relief. This Court has jurisdiction pursuant to 28 U.S.C. §1338 and 15 U.S.C. §1121.

Defendant Sam Kislin cross-claims against defendant Peter Bronner under sections 2-313, 2-314 and 2-315 of the New York Uniform Commercial Code for breach of express and implied warranties. Bronner, in turn, cross-claims against Kislin for attorney's fees, claiming that because of Kislin's failure to insist on adequate inspection, Bronner was forced to defend himself in this action. Jurisdiction over these cross-claims is based on principles of pendent jurisdiction.

A bench trial was held. My findings of fact and conclusions of law are set forth below.

I.

Plaintiffs Johnson & Johnson and Johnson & Johnson Baby Products Company market a brand of baby shampoo under the slogan "no more tears." The plaintiffs take great care in attempting to ensure that the shampoo will be no more irritating to a baby's sensitive eyes than tap water.

Johnson & Johnson registered two trademarks relating to its baby shampoo. On January 24, 1956 it registered the name "Johnson's" under registration number 620,110. On June 15, 1965 it registered the slogan "no more tears" under registration number 791,169. Defendants do not challenge the validity of these trademarks.

Defendants Product and Development Trading Corporation ("P&D"), and its President Peter Bronner, and AEC Trading Company Ltd. ("AEC") and its owner Sam Kislin, had previously done business together and at one time shared offices.

Mr. Bronner was a middleman, or broker, involved in the purchase and sale of commodities. This business often entailed importing merchandise from abroad.

In 1984 Bronner successfully completed a transaction involving the importation of a quantity of Johnson's baby shampoo from Brazil and selling it in this country. In that transaction, Bronner purchased the goods through defendants Tradema International Corporation ("Tradema") and Wolf Brajtman, an agent of Tradema who resides in Brazil. The 1984 transaction involved shampoo purchased from Johnson & Johnson's Brazilian subsidiary and packaged in bottles bearing English labels. After that transaction, Bronner learned that Johnson's Brazilian subsidiary would no longer sell its shampoo to Tradema. Furthermore, Bronner also learned that Tradema would be unable to get English labels, at least in part because Johnson's Brazilian subsidiary did not want the shampoo produced in its plant to be exported to the United States.

Early in 1985, Brajtman informed Bronner that Johnson's baby shampoo could be purchased from other suppliers in Brazil. Brajtman suggested that an English language label could be superimposed over the original Portuguese label, thus making the shampoo acceptable for sale in the United States. Bronner agreed to have English language labels prepared and to share the cost of these labels. Brajtman then arranged the purchase of the shampoo through Cabramarty S/A Importacao E Exportacao ("Cabramarty") in Brazil and its agent, Abramo Schinazi.[1]

In February of 1985, Bronner arranged to have labels made in Connecticut by Peck Packaging and Printing Company ("Peck"). The labels bore Johnson & Johnson's trademarks and simulated Johnson & Johnson's trade dress: they were teardrop-shaped, and they bore the trademarks "Johnson's" and "no more tears." Thus the front sides of these labels were essentially identical to labels used on legitimate Johnson & Johnson's baby shampoo. Bronner also arranged to have ingredient labels prepared. In early March, Brajtman ordered several hundred thousand labels and, in April, Bronner approved the labels and had them shipped to Tradema. Peck's invoices listed 879,000 labels as having been sent to Tradema. Tradema subsequently sent these labels, in two shipments, to Cabramarty in Sao Paulo, Brazil. At no time did Johnson & Johnson approve the printing by Peck of labels bearing Johnson & Johnson's trademarks or standard trade dress.

In May of 1985 Bronner showed Kislin sample bottles of the shampoo, bearing Portuguese language labeling with English language labels superimposed. Kislin then agreed to buy 84,000 bottles of shampoo: 50,000 6.9-ounce bottles and 34,000 10-ounce bottles. Bronner, through Tradema, purchased the shampoo from Cabramarty and resold it to Kislin for distribution. To pay for this transaction,

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[1] Although Cabramarty, a Brazilian corporation, was named and served, it failed to appear in this action.

Kislin obtained a letter of credit for $70,300 with Bronner as beneficiary. Of this sum, $63,900 went to Cabramarty and the remaining $6,400 represented Bronner's profit on the transaction.

At Bronner's suggestion, the letter of credit was conditioned upon the issuance by S.G.S. Control Services, Inc. ("S.G.S."), a worldwide inspection company, of an inspection certificate predicated upon an inspection of the shampoo bottles prior to shipment. Bronner had felt that an inspection of the goods purchased in Brazil, including a comparison to established genuine samples of Johnson & Johnson's product, would detect counterfeit merchandise and avoid any problems. Bronner furnished Kislin with genuine samples. However, Kislin never sent these genuine samples to S.G.S., nor did he instruct S.G.S. to compare the Brazilian shampoo to any genuine samples.

On August 9, 1985 S.G.S. issued a certificate to the effect that it had inspected a random sample of cartons and had determined that each carton contained ten bottles of shampoo labelled in English. The certificate also indicated that this inspection was in accordance with Kislin's instructions.

When the Brazilian shampoo arrived at the Port of New York on September 17, 1985, it was impounded by the Customs Service because it did not bear a label indicating the country of origin as required by United States law. Kislin was notified of this problem and three days later he received sample cases of the impounded shampoo, which he inspected.

Pursuant to Kislin's request, on September 20, 1985 Bronner arranged for the Federation Employment and Guidance Service ("Federation")[2] in New York to affix "Made in Brazil" stickers to each bottle. Bronner and Kislin split the cost of this labeling.

Bronner received samples of the shampoo on October 31, 1985. He realized that the shipment was not what he had ordered; the Peck's labels were not superimposed over Portuguese labels.[3] Bronner contends that he phoned Brajtman in Brazil to inquire as to why the original Portuguese labels were not still on the bottles. Brajtman told him that it was easier to remove the old labels before placing the new ones on, since it was difficult to align the labels exactly. Bronner tried to remove an original label, found it difficult and asked Brajtman once again what he had done. Brajtman informed him that he had used a "special solution" for removing the original labels. Bronner did not believe this story.

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[2] Charges against Federation, originally named as a defendant, have been dropped.

[3] Bronner should have known the bottles were not what he had ordered as early as September 17, 1985, when they were impounded by the Customs Service for not having a label of origin. Johnson's Baby Shampoo is contained in transparent bottles and the ingredient label is actually the back of the front label; it can be seen through the liquid. If the English labels had been superimposed on the original Brazilian labels, as they were supposed to be, the back of the Brazilian label would have been visible. According to Mr. Bronner's testimony, this would mean that there would have been no need to affix an additional "made in Brazil" label. Thus, although Bronner concedes that he realized that the merchandise was counterfeit when he received samples of it on October 31, 1985, he should have come to that realization in September.

Bronner had visited the Johnson & Johnson plant in Brazil and was aware of what legitimate Johnson & Johnson products and packaging materials looked like. The cartons he saw at the Brazil plant bore the Johnson & Johnson logo and a line drawing of the product on the inside of the carton. The cartons in the shipment he received samples of on October 31, 1985 were shoddy and bore no Johnson & Johnson markings. Genuine Johnson & Johnson bottles have a "J&J" imprint on the bottom; the shipment received by Bronner on October 31, 1985 lacked this imprint. Bronner claims that he did not inspect the bottoms of the bottles.

At no time did either Bronner or Kislin attempt to contact Johnson & Johnson, either in the United States or Brazil, to confirm that the materials contained in the shipment from Brazil were genuine. Bronner claims that after receiving the samples on October 31, he asked Cabramarty for copies of the Johnson & Johnson invoices as proof of the product's legitimacy. He never received proof of authenticity. Bronner and Kislin conversed many times during this period, each expressing some doubt as to the legitimacy of the product.[4]

AEC sold the improperly labelled shampoo at a loss.[5] On

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[4] Bronner and Kislin did other business together and it is difficult to ascertain just how much they discussed the product in question as opposed to other business. I conclude, however, that they discussed the fact that the product appeared to be counterfeit several times during this period.

[5] It is not clear why Kislin agreed to sell the product at a loss. Plaintiffs maintain that he did so because he knew the product was counterfeit and had to "dump" it for whatever he could. Kislin argues that he did so because there was a market for the shampoo in the summer, when he ordered it, but that the market had

November 12, 1985 20,000 bottles were sent to DMG Industries in Buffalo, New York through intermediary Select Food Importers Corp. ("Select"); on December 6, 1985 13,690 bottles were shipped to Odd Lot Trading, Inc. ("Odd Lot") in Columbus, Ohio,[6] and on December 20, 1985 20,000 bottles were shipped to Revco Corporation.[7]

A few days following the shipment to DMG in Buffalo, DMG complained to Select that the cases "looked terrible . . . like they were made in somebody's basement" and that they were afraid the merchandise was counterfeit. Select informed Kislin of these complaints, and Kislin relayed the complaints to Bronner. Kislin demanded assurances as to genuineness from Bronner; despite receiving none, and after providing Select with several unsatisfactory assurances, Kislin sent Select a telex "definitely confirm[ing]" that the shampoo sold through Select was manufactured by Johnson & Johnson in Brazil. At the time this telex was sent, Kislin strongly suspected that the product was not genuine.

On December 18, 1985 the shampoo remaining in DMG's warehouse was seized by federal marshals pursuant to an ex parte order issued

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"dried up" by the time the product had arrived and was released from Customs. I make no finding as to this issue.

[6] Charges against Select and Odd Lot, originally named as defendants, have been dropped.

[7] Bronner and P&D also sold some of the Brazilian shampoo to Tangible Industries ("Tangible") for a profit of $7,140. That shipment was impounded by the United States Customs Service in the Port of Philadelphia and was never delivered to Tangible. Tangible never received any money back from this transaction and thus P&D retained this profit.

by the Federal District Court in Buffalo.[8] DMG sent the seizure papers to Select on December 19, and Mickey Salter, an official of Select, immediately went to Kislin's office to tell him what had transpired. Kislin stated that there was nothing to worry about: that neither of them was named in the suit. One day later, on December 20, the final shipment of 20,000 bottles went out from AEC to Revco. That shipment was intercepted en route.[9]

Johnson & Johnson received numerous letters from parents, irate over the effect of the counterfeit shampoo on their children. While the evidence does not indicate that any user of the counterfeit product suffered severe or permanent injury, a number of young children experienced considerable discomfort as a result of use of the counterfeit shampoo. The shampoo caused tears and it also caused eye and scalp conditions requiring medical attention.

The shampoo was distributed throughout a wide geographical area, including Cleveland, Ohio; Buffalo, New York; Norwalk, Connecticut; and Miami, Florida. Although plaintiffs have managed to retrieve up to 90 percent of the counterfeit product, approximately 7,000 to 8,000 bottles have not been recovered.

II.

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[8] 85 Civ. 1516 (W.D.N.Y.).

[9] Kislin testified that he had consigned the shipment to Revco early in December, before the seizure at DMG's warehouse, and that the trucking company shipped it on December 20 on its own accord. While he claims this is customary in this business, he could easily have notified the trucking company to cancel the shipment.

Plaintiffs assert claims under Sections 32(1) and 43(a) of the Lanham Act, 15 U.S.C.A. §§1114(1) and 1125(a).

To recover under §1114(1), plaintiffs must show that defendants used a counterfeit mark which was likely to cause confusion.[10] Thus a competitor seeking to sell substantially similar goods must avoid any likelihood of confusion. Vuiton Et Fils, S.A. v. Crown Handbags, 492 F. Supp. 1071, 1075 (S.D.N.Y. 1979) (citing Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc., 281 F.2d 755, 758 (2d Cir. 1960).

Section 1125(a) provides broader protection than §1114(1) in that it protects both consumers and competitors from all forms of misdescription or misrepresentation. Vuiton, 492 F. Supp. at 1077. This section provides for recovery for false designation of origin.[11] As with the infringement section, liability for false

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[10] 15 U.S.C. §1114 provides in relevant part:

(1) Any person who shall, without the consent of the registrant -

> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods . . . on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive

* * *

shall be liable in a civil action by the registrant . . .

[11] In 1985 15 U.S.C. § 1125(a) provided in part as follows:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation

designation focuses on whether an "ordinary purchaser is 'likely to be confused' as to the source of the goods by the acts of the infringing party." Invicta Plastics (USA) Ltd. v. Mego Corp, 523 F.Supp. 619, 622 (S.D.N.Y. 1981) (citing Clarks of England, Inc. v. Glen Shoe Co. Inc., 485 F.Supp. 375 (S.D.N.Y. 1980).

Likelihood of confusion is normally determined by application of the criteria set forth in Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492, 495 (2d Cir.), cert. denied, 368 U.S. 820 (1961). These factors are (1) the strength of the primary mark or name; (2) the degree of similarity between the two marks; (3) the proximity of the products; (4) the likelihood that the earlier producer may bridge the gap between the products; (5) evidence of actual consumer confusion; (6) the defendant's good or bad faith in using the allegedly confusing mark; (7) the quality of defendant's product; and (8) the sophistication of the purchasers. See Centaur Communications v. A/S/M Communications, 652 F. Supp. 1105, 1112 (S.D.N.Y. 1987).

The vast majority of cases applying these factors involve a manufacturer who attempts to fashion its product after one already on the market. Here, where the infringing product is not merely

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> of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce ... shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

a "look-alike" but an exact counterfeit, application of the second, third and fourth of the *Polaroid* factors is not required. I do, however, briefly consider the remaining *Polaroid* factors.

Plaintiffs have successfully developed a strong mark and name. Although actual confusion is not necessary, *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 374 (S.D.N.Y.) *aff'd*, 604 F.2d 200 (2d Cir. 1979), the consumers who purchased the shampoo marketed by defendants clearly thought they were purchasing plaintiffs' product.

As to the issue of defendants' good or bad faith, defendants used plaintiffs' mark and name in an attempt to profit from the popularity of plaintiffs' product. I discuss below the question of whetner knowledge that the Brazilian product was counterfeit may be imputed to defendants.

The product imported and to some extent distributed by defendants did not meet plaintiffs' high quality standards. To the contrary, it was the lack of quality in defendants' product that caused defendants' product to be brought to plaintiffs' attention.

Baby shampoo is a relatively low priced item and it is improbable that consumers seeking to purchase Johnson's brand baby shampoo would have had the sophistication necessary to distinguish between the genuine product and defendants' counterfeit product. Indeed it is doubtful that consumers were aware of the distinctions between the packaging of plaintiffs' product and that of defendants: the J & J imprint on the bottom of bottles containing plaintiffs' genuine product and the listing of ingredients on the back of the labels on the bottles containing the genuine product, and the absence of such imprint and listing on defendants' product.

Defendants Bronner and P&D, and Kislin and AEC, sought to benefit from Johnson's strong ~~trademark~~ and good will. They violated 15 U.S.C. § 1114(1) "by offering for sale a combination of product and trademark which exactly mimics that of plaintiff, resulting in the type of confusion and deception which the Lanham Act was designed to prevent." Vuiton, 492 F. Supp. at 1076. The counterfeit shampoo as packaged, "by the very nature of [its] appearance", misrepresented its origin and thus defendants violated 15 U.S.C. § 1125(a) as well. Plaintiffs are entitled to recover under both of these sections.

III.

A.

Neither Bronner and P&D, nor Kislin and AEC, manufactured the offending product.[12] Defendant Bronner has attempted to avoid liability by establishing that he never actually owned the offending merchandise. The Lanham Act is, however, not limited in its reach to the manufacturer and the owner of the infringing merchandise, and Bronner's claim that P&D never actually owned the shampoo does not constitute a valid defense. Without P&D's activities as broker, the infringing product would never have reached the market. P&D and Bronner were, at the least, "contributory infringers." Section 32(1) (15 U.S.C. § 1114(1)) deals with the use of a counterfeit mark "in connection with the sale, offering for sale [or] distribution . . . of any goods," and §43(a) (15 U.S.C. § 1125(a)) imposes liability upon any person who causes goods containing a false description or representation to enter commerce.

---

[12] Cabramarty could have shed light on who actually manufactured the product, but as noted (supra, n.1) it has not appeared.

In El Greco Leather Products Co. v. Shoe World, 806 F.2d 392 (2nd Cir. 1986), cert denied, 484 U.S. 817 (1987), the defendant, a discount retailer, was sued for selling without permission shoes bearing plaintiff's trademark. The manufacturer of the offending products had been licensed by the plaintiff to use plaintiff's trademark on shoes produced by the manufacturer, but the shoes in question were rejected by plaintiff after inspection. The defendant then bought the rejected shoes and sold them for about a third of what shoes bearing plaintiff's mark were selling for in more exclusive retail establishments. The Second Circuit first found that the offending shoes, although initially manufactured pursuant to plaintiff's permission, qualified for Lanham Act protection. The Court then found that the retailer could be held liable under §32(1) of the Lanham Act, even though it had not manufactured the shoes, since "its sale of the shoes was sufficient 'use' for it to be liable for the results of such infringement ..." Id. at 396.

I need not determine who actually owned the infringing merchandise at any given time. Bronner (and through him P&D) and Kislin (and through him AEC) participated in the importation and distribution of the product and each intended to profit from such importation and distribution. In Display Producers, Inc. v. Shulton, Inc., 525 F. Supp. 631 (S.D.N.Y. 1981), the court declared that "a person can be liable under the Lanham Act even though that person was not directly responsible for placing the infringing goods in commerce." Id. at 633.

As I discuss below, both Bronner and Kislin should have known that the product they distributed was counterfeit. Furthermore, Bronner should have realized that the merchandise which P&D sold to AEC would reach the hands of the consuming public. Since the actions of these defendants with respect to this shampoo were so interrelated, any distinction based upon who actually owned the product at what time would be artificial.

B.

Both Bronner and Kislin assert, as defenses, that they did not intend to infringe upon Johnson's trademark or to defraud the public. Rather, they claim that they merely attempted to earn a profit by importing legitimate shampoo. While knowledge and intent are relevant on the issue of damages, neither is a necessary element in establishing a violation of either §32(1) or §43(a) of the Lanham Act.

As was discussed above, liability under the Lanham Act focuses on the likelihood of confusion. In Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538 (2d Cir. 1956), the Court, while noting that evidence of the defendant's intent may be relevant to a finding of likelihood of confusion, also noted that evidence of defendant's intent is not essential to a finding of liability.

Id. at 543 & n.3.; see also Estee Lauder, Inc. v. Watsky, 323 F.Supp. 1064, 1067 (S.D.N.Y. 1970) (when the plaintiff shows that the public is likely to assume that a counterfeit product is the genuine article, it is entitled to an injunction, without any showing that the defendant acted with knowledge or in bad faith).

IV.

A.

Section 1116(a) of Title 15 of the United States Code confers upon this court the authority to grant a permanent injunction where necessary to protect a trademark.[13] While there is no evidence that defendants are currently distributing merchandise falsely bearing the Johnson & Johnson label, an injunction is appropriate to assure that defendants will not engage in this type of behavior in the future. P&D and AEC, and all their agents, servants, officers, employees, business representatives, successors and assignees and others having notice of this order are enjoined from engaging in the distribution of false Johnson & Johnson merchandise in the future.

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[13] 15 U.S.C.A. § 1116(a) provides, in part, as follows:

> The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office ...

B.

Under 15 U.S.C. §1117(a), plaintiffs are entitled to recover monetary damages to the extent of defendants' profits, any damages which plaintiffs have suffered, and the costs of the action.[14]

1. Defendants' Profits AEC apparently sold all of its infringing shampoo product at a loss. Plaintiffs established that P&D made $6,400 by selling shampoo to AEC. Additionally, on a sale to Tangible, P&D realized an additional profit of $7,140. Thus P&D's total profit on these two sales of infringing products was $13,540.

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[14] 15 U.S.C. § 1117(a) provides:

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

2. Damages to Plaintiff

Even where the evidence of an infringement is clear, courts will not assume that the infringement has resulted in damage. Invicta Plastics (USA) Ltd. v. Mego Corp., 523 F. Supp. 619, 624 (S.D.N.Y. 1981). Damages must be proven with reasonable certainty. "The discretionary award of either damages or profits assumes an evidentiary basis on which to rest such an award. Without such a basis there can be no recovery." Vuitton Et Fils, S.A. v. Crown Handbags, 492 F. Supp. 1071, 1077 (S.D.N.Y. 1979).

At trial James Utaski, the President of Johnson & Johnson Baby Products Company, testified that the damage to plaintiffs is approximately $50,000. This figure represented three components: (1) lost sales attributed to purchasers who bought the counterfeit shampoo believing it was genuine; (2) future lost sales attributed to individuals who purchased the offending product and were dissatisfied; and (3) future lost sales attributable to negative press coverage on the counterfeit merchandise.

In the first category, Mr. Utaski testified that plaintiffs failed to recover 8,000 counterfeit bottles. I credit this testimony, and so find. Assuming that these bottles were sold at an average price of $2.00 each and that 70% of such a sales price would have been profit to Johnson & Johnson, Mr. Utaski claimed that plaintiffs lost $15,000 in sales to consumers who thought they were purchasing genuine Johnson's Baby Shampoo. I accept his projected average price, and his estimate with respect to profit, but reject his arithmetic. Eight thousand bottles multiplied by

$2.00 each at a 70% marginal profit would equal $11,200. Plaintiffs have established that they are entitled to this amount.

Mr. Utaski then estimated that roughly one-fifth of the 8,000 consumers who purchased the counterfeit product, 1,500 persons, would not buy Johnson's shampoo again. He then stated that since the average family uses six bottles of shampoo while a child is young, this would result in approximately $20,000 to $25,000. Other than Mr. Utaski's background in marketing and a long employment history with plaintiff corporation, there was no justification for these figures. Given the absence of an explanation as to how Mr. Utaski determined that one-fifth of these disappointed consumers would not buy Johnson's again, I find this damage calculation too speculative to form the basis of an award.

Similarly speculative is plaintiffs' claim of lost sales due to potential customers who were deterred from buying Johnson's shampoo because of newspaper articles concerning the counterfeit product. Mr. Utaski claimed an additional $15,000 in damages because of such lost sales. He arrived at this figure by referring to the redemption percentage that plaintiffs experience when coupons for Johnson are run in the newspaper - one and a half percent. There are too many assumptions here - the assumption that consumers treat positive information, coupon discounts, in substantially the same manner as they treat negative information, injuries caused by counterfeit products; that information about one discrete incident of product counterfeiting is translated by consumers into a belief that future such incidents are likely.

Absent more conclusive evidence on this issue, I find this element of damages too speculative.

Thus, plaintiffs' damages are limited to the $11,200 in damages due to lost sales for shampoo that was sold in place of the legitimate product.

C.

Plaintiffs claim that the use by defendants of a counterfeit of plaintiffs' product was knowing and intentional, and they note that, absent extenuating circumstances, they are entitled under section 1117(b) of Title 15 to three times their damages or three times defendants' profits, whichever is larger, together with reasonable attorney's fees.[15] Treble damages are awarded to deter merchandisers from distributing counterfeit goods in the marketplace, and absent extenuating circumstances such a treble award is virtually required when the defendants knowingly distribute counterfeit goods. Fendi S.A.S. Di Paola Fendi E Sorelle v. Cosmetic World, Ltd., 642 F.Supp. 1143, 1147 (S.D.N.Y. 1986).

Knowledge of the existence of a particular fact is established "if a person is aware of a high probability of its existence".

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[15] Section 1117(b) provides, in part,

> In assessing damages under subsection (a) of this section, the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever is greater, together with a reasonable attorney's fee, in the case of any violation of section 1114(1)(A) of this title....that consists of intentionally using a mark or designation, knowing such mark or designation is a counterfeit mark....

Leary v. United States, 395 U.S. 6, 46 n.93 (1969); Turner v. United States, 396 U.S. 398, 416 n.29. Plaintiffs argue that the evidence warrants a finding that defendants knew that the goods were counterfeit. I agree. I find that both Kislin and Bronner knew with substantial certainty prior to distribution that the Brazilian shampoo was counterfeit.

From the outset, Kislin took no precautions. Had he insisted upon a detailed S.G.S. inspection, the counterfeit shampoo would have been discovered in time to avoid the present problems. Furthermore, when Kislin received samples of the shampoo on September 20, 1985, he should have realized that the merchandise was not what he had ordered. The shampoo was in cases which, as a customer later complained, looked "like they were made in somebody's basement." Kislin distributed the shampoo despite his concern as to its authenticity. Although Bronner had told him that he could not provide proof of the product's legitimacy, Kislin sent a telex to one of his purchasers, Select Food Corporation, stating definitively that the merchandise was genuine. Finally, even after a federal court issued an ex parte order seizing some of the shampoo, Kislin did not change his conduct and he allowed an additional shipment to enter commerce.

On October 31, 1985 after examining the items, Bronner too came to the conclusion that the shampoo was not what he had ordered. While he knew the bottles were supposed to have English labels superimposed over Portuguese labels, only the labels printed by Peck's were on the bottles. Bronner then called Brajtman who gave an unsatisfactory answer regarding the absence of the Portuguese labels. Furthermore, Bronner knew that the cartons were different than those produced by Johnson's in Brazil, and he did not check the bottoms of the bottles for the "J & J" imprint which would have bwen present if the shampoo was genuine. He acknowledges that at this point he had "a funny feeling" that the items were not real.

Even if Kislin on September 20 or Bronner on October 31 did not yet realize that the shampoo was counterfeit, they certainly had to have had misgivings. At those points in time a phone call to Johnson & Johnson would have been appropriate and could have resolved the matter. Kislin and Bronner were content to close their eyes to the high probability that the goods were counterfeit.

Thus defendants acted with knowledge of the substantial probability that the goods were counterfeit. Under §1117(b), plaintiffs are entitled to three times the greater of their own damages or defendants' profits.[16] Although only P&D and Bronner earned a profit, this amount was greater than plaintiffs' damages and thus plaintiffs are entitled to a judgment in the amount of three times the $13,540 profit.

Additionally, §1117(b) provides that in exceptional circumstances plaintiffs may recover both the costs of the action and reasonable attorney's fees. I find the circumstances of this case warrant an award of attorney's fees and costs.

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[16] In Fendi, Judge Sand reviewed the legislative history of §1117(b) and noted that treble damages are to be awarded except in the rare case where such an award would mean that the defendant would be unable to support his or her family. Fendi, 642 F. Supp. at 1147 (quoting Joint Explanatory Statement, 130 Cong. Rec. H.12,076 at 12,083 (daily ed. Oct. 10, 1984)). The circumstances of this case fall short of the required showing of hardship.

The parties have stipulated that plaintiffs paid attorney's and investigators' fees totalling $176,749.65 up to the time of trial. While this amount is not broken down into hourly rates and hours spent on the case, I adopt this figure in light of the parties' agreement.

Since I have found that Kislin and Bronner knowingly violated the Lanham Act, plaintiffs are entitled to judgment against them as well as against the corporate entities for whom they acted.[17]

D.

Plaintiffs also seek punitive damages based upon defendants common law trademark infringement. Having granted plaintiffs treble damages and attorney's fees, I decline to award punitive damages.

V.

Kislin and AEC assert a cross-claim against Bronner and P&D for breach of express and implied warranties.

Any claims under implied warranties of merchantability, UCC §2-314, or fitness for a particular use, UCC §2-315, are negated by AEC's failure to examine the goods. Under UCC §2-316(3)(b), where a buyer refuses to examine goods, he forgoes all implied warranties "with regard to defects which an examination ought in the circumstances to have revealed." While Comment 8 to UCC § 2-316(3)(b) notes that a buyer who fails to inspect the goods waives his claim under an implied warranty only if the seller has demanded "that the buyer examine the goods fully," Bronner satisfied this requirement by recommending that Kislin employ the services of S.G.S. At Bronner's urging, Kislin conditioned his payment under the letter of credit on a thorough S.G.S. inspection. Kislin, however, failed to provide S.G.S. with genuine samples so that a comparison could be made. Thus the inspection by S.G.S. was limited to checking the quantity of the shipment and the language on the outer label. No chemical analysis was performed. The certification which satisfied the condition in the letter of credit was inadequate due to Kislin's failure to provide S.G.S. with the instructions and materials needed to perform an adequate inspection. Kislin's negligence negates any implied warranties under §§ 314 or 315.

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[17] Cf. Louis Vuitton S.A. v. Spencer Handbags Corp., 597 F. Supp. 1186, 1191 (E.D.N.Y. 1984) (in light of evidence that the individual defendants, but not the corporate defendant, engaged in the sale of counterfeit goods, judgment was not entered against the latter), aff'd, 765 F.2d 966 (2d Cir. 1985).

AEC's express warranty claim is based upon §2-313(1)(b) which provides that a description of goods that is part of the "basis of the bargain" establishes an express warranty. Kislin claims that since Bronner promised him "Johnson's Baby Shampoo" and supplied him with non-conforming shampoo he has a claim for breach of express warranty. Neither Kislin nor Bronner devoted any effort to discussing this claim and I find that plaintiff has failed to establish this basis of recovery.[18]

VI.

The cross-claim by Bronner and P&D against Kislin and AEC must also be rejected. This claim asserts that if Kislin had used S.G.S. as he agreed to then payment would not have been made pursuant to the letter of credit and the shampoo would not have been distributed.

While Bronner is correct that any liability would have been avoided but for Kislin's negligence, once Bronner realized that the shampoo was not what he had ordered, he should have taken steps to avoid distribution. By failing to do so, Bronner became a contributory infringer and his presence in this action resulted from his own actions.

VII.

Plaintiffs should present a judgment reflecting this order. Defendants' respective cross-claims are rejected.

SO ORDERED.

VINCENT L. BRODERICK, U.S.D.J.

Dated: White Plains, New York
March 30, 1990

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[18] I note that this cross-claim seeks to shift the liability of Kislin and AEC to Bronner. Plaintiffs' recovery, however, is a result of knowing violation by both defendants of the Lanham Act.

Copies have been mailed to:

John Nields, Esq.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Howard Schrader, Esq.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10112

Jerome Klein, Esq.
Byrne, Klein & Kvalden
535 Fifth Avenue
New York, New York 10017

Jay H. Schafrann, Esq.
100 Park Avenue
New York, New York 10017

EXHIBIT 2

Recent Recalls of Diverted Products

November 1, 1989 FDA Enforcement Report -

JOHNSON'S Baby Shampoo Class III Recall:

1,608 bottles of Portugal-manufactured shampoo distributed in Ohio. Label lacked all required information and failed to list boric acid as an ingredient. (Exhibit)

January 24, 1990 FDA Enforcement Report -

JOHNSON'S Baby Sunblock Class II Recall:

12.5 oz. bottles from United Kingdom and distributed in Indiana, Illinois, Iowa and Kentucky. Label lacked all required information and did not contain a declared ingredient quarterium-15. Product believed to contain bronopol. (Exhibit)

Johnson & Johnson
BABY PRODUCTS COMPANY
SKILLMAN, NJ 08558-9418

September 25, 1989

C. E. Sedgwick
Food and Drug Administration
Compliance Branch
1141 Central Parkway
Cincinnati, Ohio 45202-1097

Re: Product Labeled as Being
JOHNSON'S champô para bebé

Dear Mr. Sedgwick:

We learned of this product as the result of a consumer complaint when a mother called us asking about the boric acid in the shampoo and if it was safe to use.

A label examination and analysis of the above product purchased at two Marcs' stores in Ohio reveal the product to be misbranded when examined for compliance with the Federal Food, Drug, and Cosmetic Act.

- This product is similar to product manufactured by JOHNSON & JOHNSON Lda, Portugal. The containers have been labeled with a false and misleading label by persons unknown to JOHNSON & JOHNSON. The product does not contain Boric Acid as stated on the ingredient statement (see Attachment 1 - Analytical Report). This label renders the product misbranded under Federal Food, Drug, and Cosmetic Act Section 602(a) because the ingredients on the label are not the ingredients in the container nor are they the ingredients of the JOHNSON & JOHNSON Lda, Portugal formulation.

- The principle display panel does not contain a statement of the identity of the commodity. This violates 21 CFR 701.11(a).

- The name and address of the manufacturer is obscured by the ingredient label. This violates 21 CFR 701.12(e).

- The declaration of net quantity of contents is not on the principle display panel. This violates 21 CFR 701.13(e).

- Ingredient statement is in English only. If the label contains any representation in a foreign language, all words, statements, and other information required by or under the authority of the Act to appear on the label shall appear thereon in the foreign language. This violates 21 CFR 701.2(b)(2).

- The ingredient list includes unacceptable names and does not identify the colorants. Amphoteric 19 is an obsolete name. This violates 21 CFR 701.3(a) and 21 CFR 701.3(c).

The addresses of the stores where the above product is offered for sale follows:

Marcs
Center Ridge
Rocky River, Ohio

Marcs
Lorraine Avenue
Cleveland, Ohio

Marcs
Southland Drive
Middleburg Heights, Ohio

Enclosed are copies of receipts documenting purchases and other requested information. The product was purchased by JOHNSON & JOHNSON field sales representatives.

Since this product is in violation of the Federal Food, Drug, and Cosmetic Act, Section 602(a), we feel the product should be recalled.

If you have any questions regarding this material, please call me at (201) 874-1337.

Sincerely,

Marjorie McTernan
Director, Regulatory Affairs

ls/1550A/24

Encl. as stated

ATTACHMENT 1

ORATORY SERVICES

PLEASE TYPE OR PRINT NEATLY; PRESS DOWN HARD

ANALYTICAL REQUEST AND REPORT

FILE A	LAB D	LOG NUMBER 89-1082	
DATE IN 9/18/89	EST. DATE OUT 9/25/89	CATEGORY FP	SOURCE/SUBMITTER MARJORIE McTEERNAN

PROJECT NO. 1303	PROJECT NAME J B S	FORMULA NUMBER Portugal #2389	LOT/BATCH NO 6036	SPECIFICATION NO.	NO. SAMPLES 1
SAMPLE IDENTIFICATION JBS Portugal	Relabeled as old Amphoteric 19 formula	SIZE 200ml	DATE NEEDED BY ASAP	NO. RETAINS	

ANALYSIS REQUESTED/REMARKS
Please do IR, Solids, & UV Scan of dyes & Boric Acid
Confirm that this is not the old "Amphoteric 19" formula

TEST/CHARACTERISTIC	METHOD NO.	SPEC RANGE/CONC	RESULTS
Authentic Johnson & Johnson Baby Shampoo F 2384 batch 2200f was used to compare to the "JBS portugal" sample.			
			Authentic Tested sample
Boric Acid	Notebook Colorimetric procedure.		positive negative
			detection of the method: about 20 ppm
% Solid	7257		30.9 30.7% 12.8, 12.8%
IR	7124		different between two spectra in the region of 1720 cm⁻¹, 1600 cm⁻¹ and 1200-1350 cm⁻¹
UV/Vis	7180		λmax 418 A: 2.13 λmax 420 A: 1.7 λmax 442 A: 1.84 λmax 442 A: 1.5

CONFORM TO SPEC	ANALYST	NB REF	PAGE	CHECKED BY
☐ YES ☐ NO ☑ N/A	WW	1582	63	MC
DATE OUT 9/21/89	MC	1582	65	
	PQ	1661	48	MC

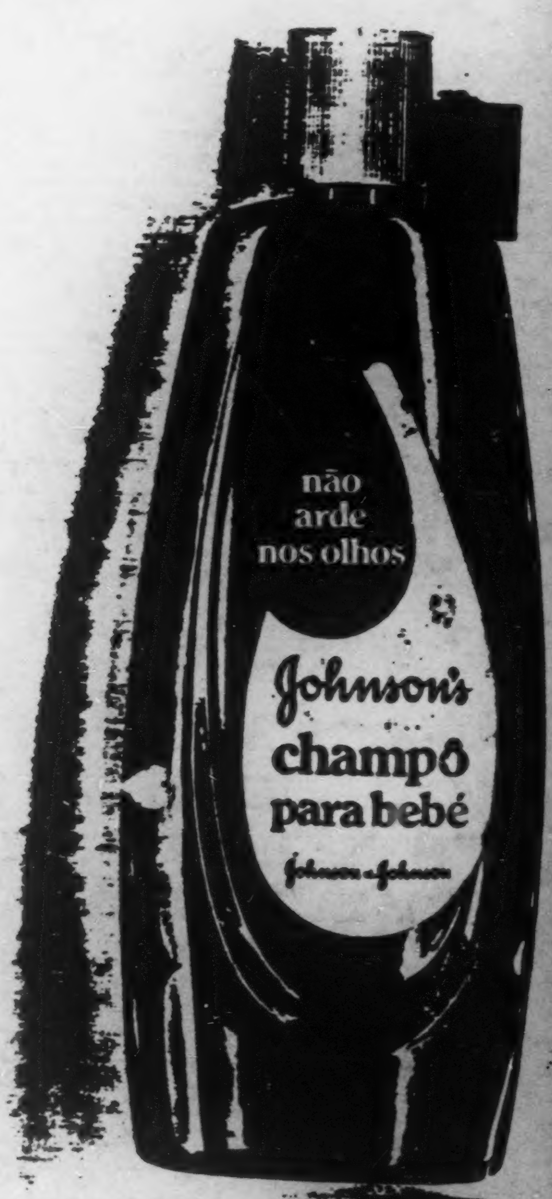
COMMENTS

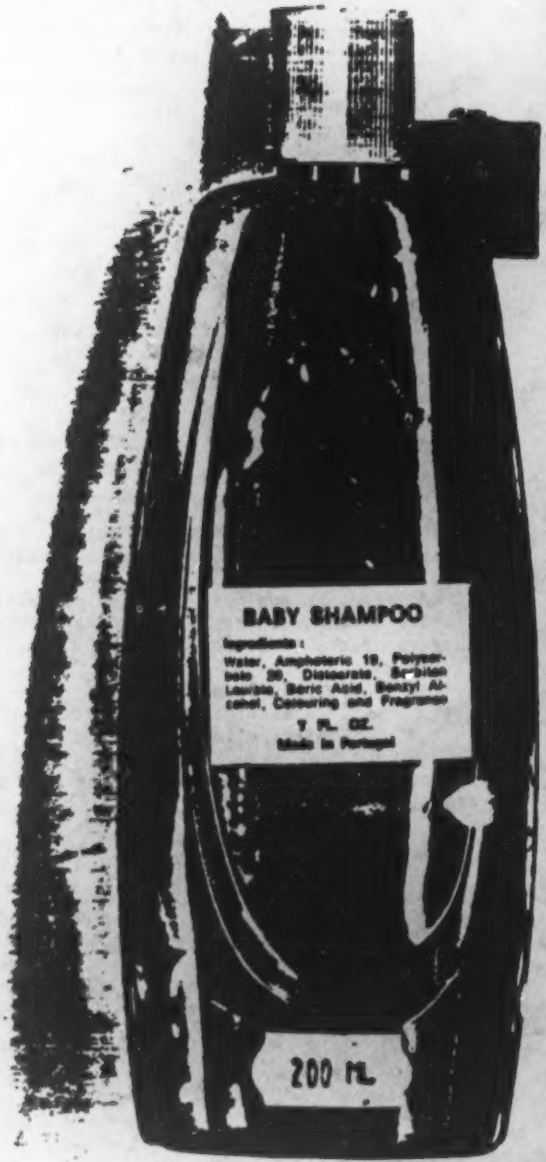
REVIEWED BY

FORM 730-4 REV. 7/86

©JOHNSON & JOHNSON BABY PRODUCTS CO. 1977

COPY DISTRIBUTION: WHITE - Central File; GREEN - Report Copy; CANARY - Dept. File Copy; PINK - Lab File Copy; GOLDENROD - Originator


não
arde
nos olhos
Johnson's
champô
para bebé
Johnson & Johnson


BABY SHAMPOO
Ingredients :
Water, Amphoteric 19, Polysorbate 20, Distearate, Sorbitan Laurate, Boric Acid, Benzyl Alcohol, Colouring and Fragrance
7 FL. OZ.
Made in Portugal
200 ML

Johnson & Johnson
BABY PRODUCTS COMPANY
SKILLMAN, NJ 08558-9418

October 25, 1989

Mr. Clarence Danielson
Acting Director, Investigations Branch
Food and Drug Administration
1560 E. Jefferson Avenue
Detroit, MI 48207

Re: Product Labeled as Being JOHNSON's Baby Shampoo

Dear Mr. Danielson:

As a follow-up to my letter of October 17, 1989, please find attached the analytical report which verifies the absence of Quaternium-15.

In addition, an employee has also purchased what appears to be the same product at another Peoples drug store (copy of label enclosed). The address of the store is:

Peoples Drug
1440 East 86th Street
Indianapolis, IN

If you have any questions regarding this material, please call me at (201) 874-1375.

Sincerely,

Ralph H. Larsen

Ralph H. Larsen
Regulatory Affairs Associate

/la/1550A/38

LABORATORY SERVICES

PLEASE TYPE OR PRINT NEATLY; PRESS DOWN HARD

ANALYTICAL REQUEST AND REPORT

FILE A	LAB S	LOG NUMBER 84-1202

DATE IN 10-17-89	EST. DATE OUT 10-18-89	CATEGORY F P	SOURCE/SUBMITTER RALPH H. LARSEN / REGULATORY

PROJECT NO. 7303	PROJECT NAME JBS	FORMULA NUMBER UNKNOWN	LOT/BATCH NO X437	SPECIFICATION NO.	NO SAMPLES 1

SAMPLE IDENTIFICATION ALLEGED JBS (ENGLAND) FROM PEOPLES DRUG INDIANAPOLIS, IN	SIZE 12.5 OZ.	DATE NEEDED BY ASAP	NO. RETAINS

ANALYSIS REQUESTED/REMARKS
CHECK FOR PRESENCE OF QUATERNIUM-15

TEST/CHARACTERISTIC	METHOD NO.	SPEC RANGE/CONC	RESULTS
Dowicil 200 (Quaternium-15)	TM 334D		NOT FOUND

CONFORM TO SPEC ☐ YES ☐ NO ☐ N/A	ANALYST	NB REF	PAGE	CHECKED BY
DATE OUT 11 / 9 / 89		1160	16, 97	

COMMENTS

REVIEWED

FORM 728-4 REV. 7/80

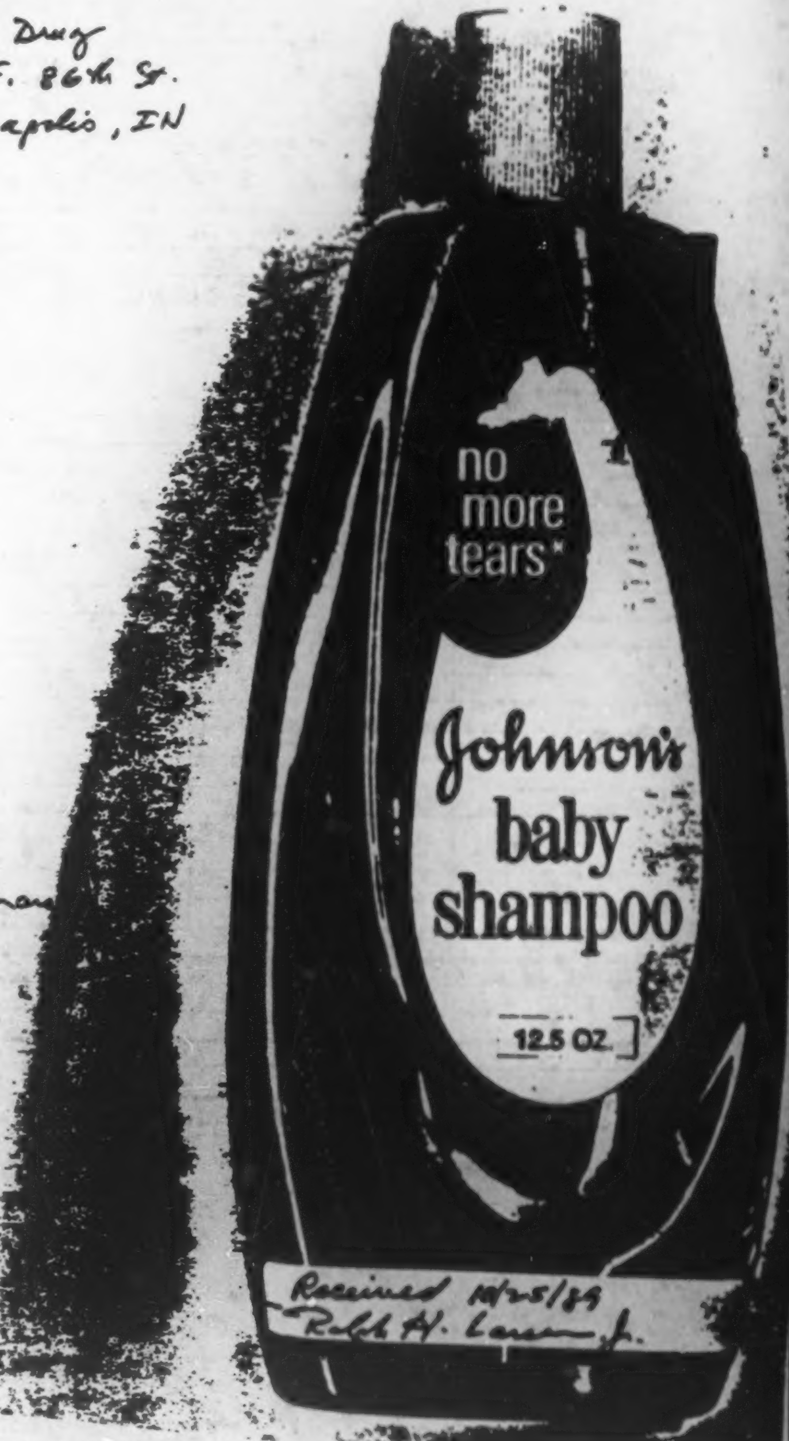
©JOHNSON & JOHNSON BABY PRODUCTS CO. 1977

COPY DISTRIBUTION: WHITE - Control File; GREEN - Report Copy; CANARY - Dept. File Copy; PINK - Lab File Copy; GOLDENROD - Originator

Product purchased at:

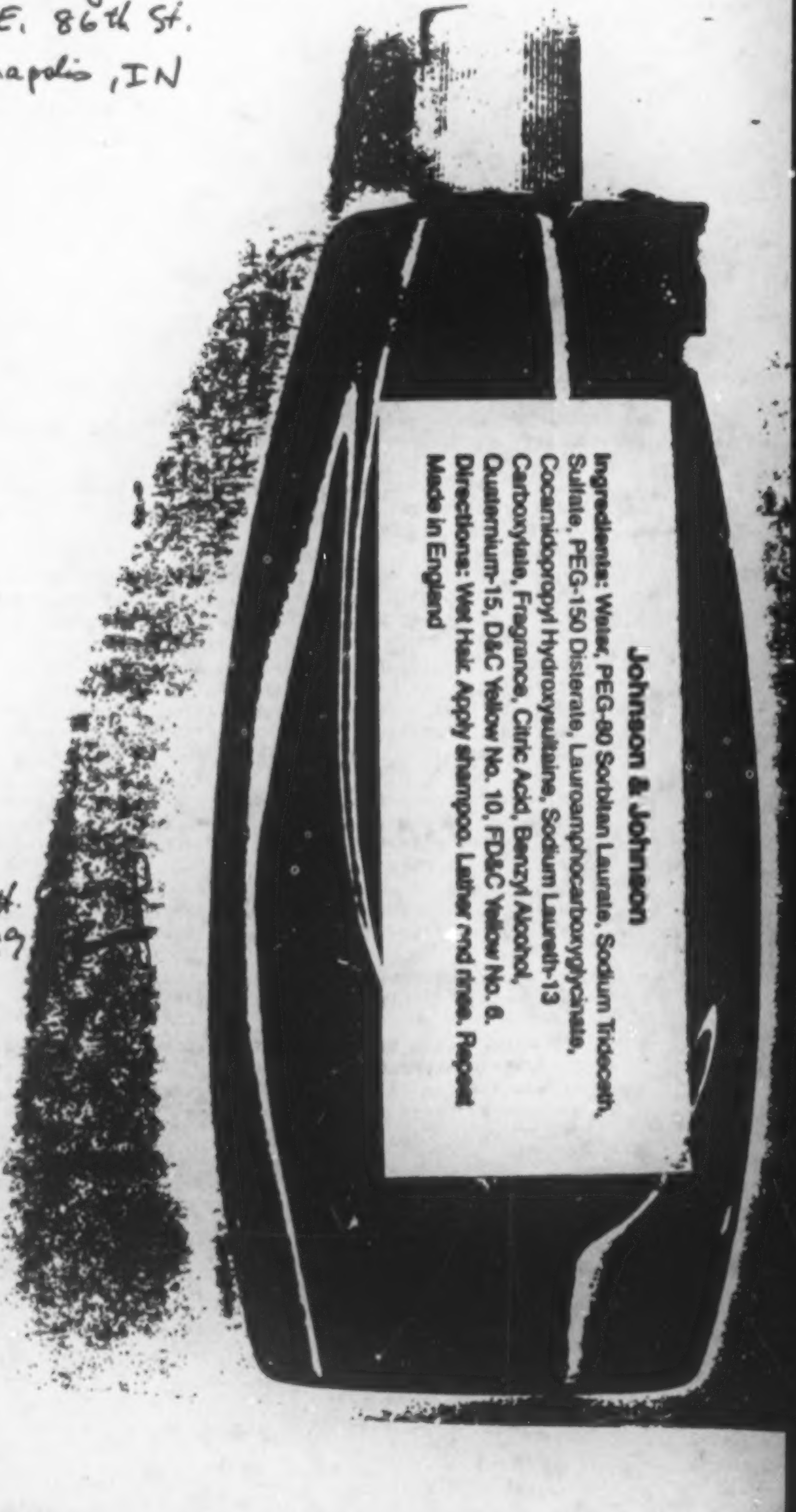
Peoples Drug
1440 E. 86th St.
Indianapolis, IN

Ralph H. Lar
10/25/89


no
more
tears*
Johnson's
baby
shampoo
12.5 OZ.

Received 10/25/89
Ralph H. Larsen J.

Product purchased at:
Peoples Drug
1440 E. 86th St.
Indianapolis, IN



Johnson & Johnson

Ingredients: Water, PEG-80 Sorbitan Laurate, Sodium Trideceth Sulfate, PEG-150 Distearate, Lauroamphocarboxyglycinate, Cocamidopropyl Hydroxysultaine, Sodium Laureth-13 Carboxylate, Fragrance, Citric Acid, Benzyl Alcohol, Quaternium-15, D&C Yellow No. 10, FD&C Yellow No. 6.

Directions: Wet Hair. Apply shampoo. Lather and rinse. Repeat.

Made in England

Ralph H.
10/25/89

Johnson & Johnson
BABY PRODUCTS COMPANY

SKILLMAN, NJ 08558-9418

October 13, 1989

Mr. George Bailey
Food and Drug Administration
Compliance Branch
433 W. Van Buren Street, Room 1222
Chicago, Illinois 60607

Re: Product Labeled as Being JOHNSON's Baby Shampoo

Dear Mr. Bailey:

We learned of this product through an employee who had purchased it at Peoples Drug in Moline, Illinois.

A label examination and analysis of the above product reveals it to be misbranded when examined for compliance with the Federal Food, Drug, and Cosmetic Act.

- This product is similar in appearance to product manufactured by JOHNSON & JOHNSON Limited, England. The container has been labeled with a false and misleading label by persons unknown to JOHNSON & JOHNSON. This label renders the product misbranded under Federal Food, Drug, and Cosmetic Act Section 602(a) because the ingredients on the label are not the ingredients of the JOHNSON & JOHNSON, Limited, England formulation. The product does not contain Quaternium-15 (Attachment 1) as well as other ingredients on the label.

  We believe the product may contain 2-Bromo-2-Nitropropane-1,3-Diol (Bronopol) a preservative whose use has decreased because of concerns of nitrosamine formation (Cosmetic Ingredient Review Report 4-79, CTFA).

- The label does not have the place of business of the manufacturer, packer, or distributor. This violates 21 CFR 701.12

- The declaration of net quantity is stated as ounce instead of fluid-ounce. This violates 21 CFR 701.13(b).

- The declaration of net quantity of contents does not express an accurate statement of the quantity of contents of the container. An examination of three samples reveal approximately a nine (9) percent shortage from stated volume. This violates 21 CFR 701.13(a).

Page 2

The address of the store where the above product is offered for sale is:

Peoples Drug
4411 16th Street
Moline, IL 61265

which is owned by:

Price Rite Discount Pharmacy
14350 Airport Road
Indianapolis, Indiana

Also enclosed is a copy of the label. The backside of the front label cannot be copied due to obstruction by the ingredient label. On the front label affixed is the Peoples Drug price sticker.

Since we have not been able to verify the authenticity of this product and it is in violation of the Federal Food, Drug, and Cosmetic Act, Section 602(a), we feel the product should be recalled.

If you have any questions regarding this material, please call me at (201) 874-1375.

Sincerely,

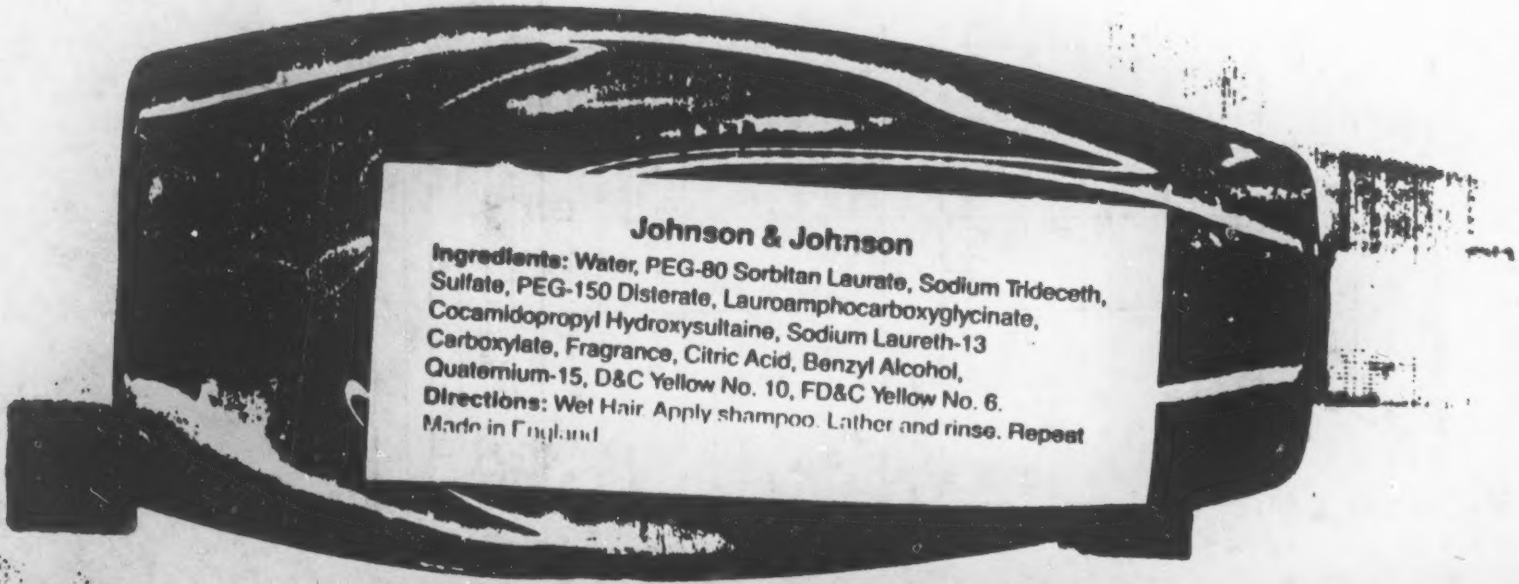
Ralph H. Larsen

Ralph H. Larsen
Regulatory Affairs Associate

/ls/1550A/31

no more tears*
98 HHL
2.99
Johnson's
99
bab shampoo
2.25
12.5 OZ.

Received 10/10/89
Robt. H. Larsen Jr.



Johnson & Johnson

Ingredients: Water, PEG-80 Sorbitan Laurate, Sodium Trideceth, Sulfate, PEG-150 Distearate, Lauroamphocarboxyglycinate, Cocamidopropyl Hydroxysultaine, Sodium Laureth-13 Carboxylate, Fragrance, Citric Acid, Benzyl Alcohol, Quaternium-15, D&C Yellow No. 10, FD&C Yellow No. 6.

Directions: Wet Hair. Apply shampoo. Lather and rinse. Repeat

Made in England

LABORATORY SERVICES

PLEASE TYPE OR PRINT NEATLY; PRESS DOWN HARD

ANALYTICAL REQUEST AND REPORT

FILE: A	LAB: D	LOG NUMBER: 89-1171	
DATE IN: 10-12-89	EST. DATE OUT: 10/13	CATEGORY: FP	SOURCE/SUBMITTER: RALPH H. LARSEN/REGULATORY
PROJECT NO.: 7303	PROJECT NAME: JBS	FORMULA NUMBER: UNKNOWN	LOT/BATCH NO: NOT IDENT.
SPECIFICATION NO.:	NO. SAMPLES: 1		
SAMPLE IDENTIFICATION: ALLEGED JBS FROM ENGLAND (FROM PEOPLES DRUG, MOLINE IL)	SIZE: 12.5 OZ	DATE NEEDED BY: ASAP	NO. RETAINS:

ANALYSIS REQUESTED/REMARKS: CHECK FOR PRESENCE OF QUATERNIUM-15,

TEST/CHARACTERISTIC	METHOD NO.	SPEC RANGE/CONC	RESULTS
Dowicil 200	BP1421		None Detected.
(QUATERNIUM-15)			Min. Detection Level = 0.001%

CONFORM TO SPEC: ☐ YES ☐ NO [✓ N/A]	ANALYST: Wet/Chem	NB REF: 1660	PAGE: 71	CHECKED BY:
DATE: 10/13				

COMMENTS:

REVIEWED:

FORM 700-4 REV. 7/80

COPY DISTRIBUTION: WHITE - Control File; GREEN - ...

© JOHNSON & JOHNSON BABY PRODUCTS CO. 1977

EXHIBIT 3

DIVERTED PRODUCTS DETAINED BY U.S. CUSTOMS (EXHIBIT 3)

- December 7, 1989 JOHNSON'S Baby Cologne
  Assumed from the Phillipines. Product misbranded. Trademark defaced.

- September 20, 1989 JOHNSON'S Baby Shampoo
  Assumed from Chile. Product misbranded. Trademark defaced.

- September 13, 1989 JOHNSON'S Baby Shampoo
  Assumed from Chile. Product misbranded. Trademark defaced.

- November 17, 1987 JOHNSON'S Baby Powder
  Assumed from Mexico.

- May 8, 1987 JOHNSON'S Aceite Para Ninos
  Assumed from Venezuela.

- March 11, 1986 JOHNSON'S Baby Powder
  Assumed from Brazil

- February 19, 1986 JOHNSON'S Baby Powder
  Assumed from Brazil.

- October 15, 1985 JOHNSON'S Baby Lotion
  Assumed from Portugal.

- September 30, 1985 JOHNSON'S Baby Powder
  Assumed from Brazil.

- August 27, 1985 JOHNSON'S Baby Oil
  JOHNSON'S Baby Shampoo
  Assumed from Portugal.

- July 19, 1985 JOHNSON'S Baby Cream
  JOHNSON'S Baby Shampoo
  JOHNSON'S Baby Lotion
  Assumed from Portugal.

Johnson & Johnson
BABY PRODUCTS COMPANY

SKILLMAN, NJ 08558-9418

December 8, 1989

FEDERAL EXPRESS

Compliance Officer
Food and Drug Administration
50 U.N. Plaza Federal Office Building, Room 526
San Francisco, CA 94102

SUBJECT: Samples of Baby Cologne from the Philippines

Dear Sir:

Enclosed is a copy of a letter sent to U.S. Customs concerning a shipment of the above products which is presently being detained.

As you will note, the products are misbranded and not legally marketable in the United States.

If you have any questions regarding this material, please call me at (201)874-1375.

Sincerely,

Ralph H. Larsen

Ralph H. Larsen
Regulatory Affairs Associate

/lc

Encl./

cc: ID#2165A

Johnson & Johnson
BABY PRODUCTS COMPANY
SKILLMAN, NJ 08558-9418

December 7, 1989

Deborah Walsh
Import Specialist, ISET/IPR
Department of the Treasury
U.S. Customs Service
P.O. Box 2450
San Francisco, CA 94126

Re: Samples of Baby Cologne from the Philippines

- Alleged JOHNSON'S Baby Cologne-Regular
  Customs Sample No. SP 3013

- Alleged JOHNSON'S Baby Cologne-Floral
  Customs Sample No. SP 3014

- Alleged JOHNSON'S Baby Cologne-Fresh Blossoms
  Customs Sample No. SP 3015

Dear Ms. Walsh:

Samples of the above products were received from you on December 5, 1989 and have been examined for compliance with the Food, Drug and Cosmetic Act.

These products are similar in appearance to the products manufactured by JOHNSON & JOHNSON (Philippines) Inc. The containers have been labeled with a declaration of net contents label unauthorized by JOHNSON & JOHNSON in a facility unknown to JOHNSON & JOHNSON and by persons unknown to JOHNSON & JOHNSON.

With respect to the Food, Drug and Cosmetic Act, we find them to be misbranded for the following reasons:

- The product label does not contain a declaration of ingredients. This is in violation of 21 CFR 701.3(a).

- The product label does not specify conspicuously the name and place of business of the distributor nor does it include an adequate street address. This is in violation of 21 CFR 701.12(a) and 21 CFR 701.12(d)

In addition, all JOHNSON & JOHNSON baby products manufactured and sold in the United States are sealed with a tamper-evident band and instructions to the consumer not to purchase if the seal is broken or missing. All JOHNSON & JOHNSON baby products show a toll-free telephone number which consumers can call to make inquires or enter complaints about JOHNSON & JOHNSON products. Also, JOHNSON & JOHNSON baby products labeling in the United States contains the safety tip, "Keep all baby care products out of reach of young children-they are not toys."

With respect to trademark law, we believe the defacing of our label violates our trademark and copywrite. No one outside of JOHNSON & JOHNSON is authorized to use the JOHNSON & JOHNSON trademark.

Over the course of many years, JOHNSON & JOHNSON has developed a strong consumer loyalty to its products. American consumers have distinct perceptions of JOHNSON & JOHNSON products. Any alterations in labeling such as was done to these products are readily noticed by American consumers and seriously threaten to undermine carefully cultivated consumer loyalties.

Returned with this letter as requested are the three samples.

In conclusion, we restate the subject products are misbranded under the Food, Drug, and Cosmetic Act and are not legally marketable in the United States.

If you have any other questions regarding this material, please call me at (201) 874-1375.

Sincerely,

Ralph H. Larsen
Regulatory Affairs Associate

ls/1550A/49

cc: Compliance Officer
Food and Drug Administration
50 U.N. Plaza Federal Office Building, Room 526
San Francisco, CA 94102

Johnson & Johnson
BABY PRODUCTS COMPANY

SKILLMAN, NJ 08558-9418

September 20, 1989

FEDERAL EXPRESS PRIORITY 1

Ms. Jeannette Wilson, ISET
U.S. Customs Service
77 S.E. 5th Street
Miami, Florida 33131

RE: Samples of Baby Shampoo

Dear Ms. Wilson:

Samples of the above products were received from you on September 18, 1989 and have been examined for compliance with the Food, Drug and Cosmetic Act. We find them to be misbranded for the following reasons:

- These products are similar in appearance to the products manufactured by international companies of JOHNSON & JOHNSON. The batch numbers have been obliterated making it impossible for us to confirm that these are geniune JOHNSON & JOHNSON de Chile S.A. products. The containers have been labeled with a false and misleading label by persons unknown to JOHNSON & JOHNSON. This label renders the product misbranded under the FD&C Act Sec. 602(a) [21U.S.C. 362(b)] because the ingredients are not the ingredients of a JOHNSON & JOHNSON international formulation.

- The principle display panel does not contain a statement of the identity of the commodity. The principle display panel has been mutilated. This violates 21CFR 701.11(a).

- The label does not contain the correct name, and contains no place of business of manufacturer, packer, or distributor. Printing after JOHNSON & JOHNSON has been blocked out. This violates 21CFR 701.12(a).

- The declaration of net quantity of contents is not on the principle display panel. This violates 21CFR 701.13(e).

- Ingredient statement is in English only. If the label contains any representation in a foreign language, all words, statements, and other information required by or under the authority of the Act to appear on the label shall appear thereon in the foreign language. This violates 21CFR 701.2(b)(2).

- The declaration of net quantity of contents is on the rear label. The print is the same size and color as the other printing on the rear label. The declaration is not conspicuous. This violates 21CFR 701.13(h).

continued...

- We believe the defacing of the label violates our trademark and copyright. No one outside of JOHNSON & JOHNSON is authorized to use the JOHNSON & JOHNSON trademark.

The safety of the adhesive on the back label cannot be determined because it is unknown to us.

In addition, the trademark "NO MORE TEARS WITH DOUBLE TEAR DROP DESIGN," No. 1,464,157 has been recorded with the U.S. Customs Service (see attached).

If you have any other questions regarding this material, please call me at (201)874-1375.

Sincerely,

Ralph H. Larsen

Ralph H. Larsen
Regulatory Associate

/lc

Attach./

cc: Therese Burke
Compliance Officer
Food and Drug Administration
6601 N.W. 25th Street, Rm. 236
Miami, Florida 33159-2256

ID#1

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C.

MAY 23 1988
R.F.B.

MAY 14 1988

TMK-2 CO:R:C:V
742412 L

Mr. Richard R. Biribauer
Johnson & Johnson
One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933-7001

Dear Mr. Biribauer:

As requested in your letter of January 29, 1988, the trademark "NO MORE TEARS WITH DOUBLE TEAR-DROP DESIGN," No. 1,464,157, has been recorded in this Department in the name of Johnson & Johnson, in accordance with the trademark laws.

Facsimiles of the trademark showing notice of recordation have been forwarded to Customs officers at ports and stations of entry for appropriate import protection. Copies of the notice issued are enclosed.

Sincerely,

Marvin M. Amernick

Marvin M. Amernick
Chief, Value, Special Programs
and Admissibility Branch

Enclosures

ORIGINATING OFFICE CO:R:C:V DISTRIBUTION [illegible]

TRADEMARK

NUMBER 88-206
EFFECTIVE DATE 4/27/88
EXPIRES [illegible]-10-2007

SUBJECT "NO MORE TEARS WITH DOUBLE TEAR-DROP DESIGN," (Hair Products), Classes 51 & 52, Int'l Class 3 - Recordation

REFERENCES: 15 U.S.C. 1124, 19 U.S.C. 1526. Sections 133.21 - 133.24, Customs Regulations

1. ,The trademark is owned by Johnson & Johnson, a corporation organized under the laws of the State of New Jersey, located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933-7001.

2. Hair products bearing the mark are manufactured and sold by the trademark owner's related firms listed in Exhibit B (copy attached).

   The information provided above and in the attachment will assist Customs officers in identifying "genuine" trademarked articles (as opposed to "counterfeits" or other copies).

   Genuine trademarked articles may be imported by anyone without restriction, insofar as Customs trademark laws are concerned.

3. No imported articles bearing copying or simulating (counterfeit, or confusingly similar), name or mark may be admitted to entry.

FILE: TMK-2-CO:R:C:V
742412 L

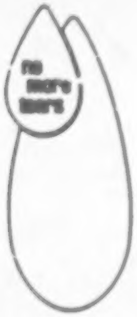
Marvin M. Amernick
Chief, Value, Special Programs
and Admissibility Branch

Int. Cl.: 3

Prior U.S. Cls.: 51 and 52

United States Patent and Trademark Office Reg. No. 1,464,157
Registered Nov. 10, 1987

TRADEMARK
PRINCIPAL REGISTER



JOHNSON & JOHNSON (NEW JERSEY CORPORATION)
ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, NJ [illegible]

FOR: HAIR SHAMPOO, HAIR CONDITIONER, AND HAIR SHAMPOO WITH CONDITIONER, IN CLASS 3 (U.S. CLS. 51 AND 52).

FIRST USE 1-6-1950; IN COMMERCE 1-6-1950.

OWNER OF U.S. REG. NOS. 791,169 AND 1,095,979.

SEC. 2(F) AS TO "NO MORE TEARS".

SER. NO. 620,221, FILED 9-15-1986.

GARY L. SHAFFER, EXAMINING ATTORNEY

REGISTERED FOR A TERM OF 20 YEARS FROM Nov. 10, 1987

ATTEST

DEC 28 1987

ATTESTING OFFICER

fied to be a true copy of the registration issued by the United States Patent & Trademark Office, which registration is in full force and effect. Record title is in Registrant.

COMMISSIONER OF PATENTS AND TRADEMARKS

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
MIAMI, FL 33131

09-15-89

REFER TO
ISET

RECEIVED
SEP 18 1989
MARJORIE McTERNAN

Mrs. Marjorie McTernan
Johnson & Johnson
199 Grand View Road
Skillman, N. J. 08558

Dear Mrs. McTernan:

Enclosed please find a samples of baby shampoo and sanitary napkins imported through the port of Miami, Florida. There is a question as to the authenticity of the merchardise. Please conduct an examination and determine if the merchandise is genuine.

Please send the results and return the sample to:

U.S. Customs Service
77 S.E. 5th Street
Miami, FL 33131

Attn: Jeannette Wilson, ISET

Your prompt response to this request will be appreciated. If this office has not heard from you within one week from the date of this correspondence, we will consider the merchandise to be genuine, non-infringing and admissible into the commerce. If you have any questions regarding this matter, contact me at (305) 536-[illegible]902. Your prompt response to this request will be appreciated.

Sincerely,

Jeannette Wilson

Jeannette Wilson
Team Leader, Import Specialist
Enforcement Team

Enclosure

REPLY TO: DISTRICT DIRECTOR OF CUSTOMS, 77 S.E. 5th STREET, MIAMI, FL 33131

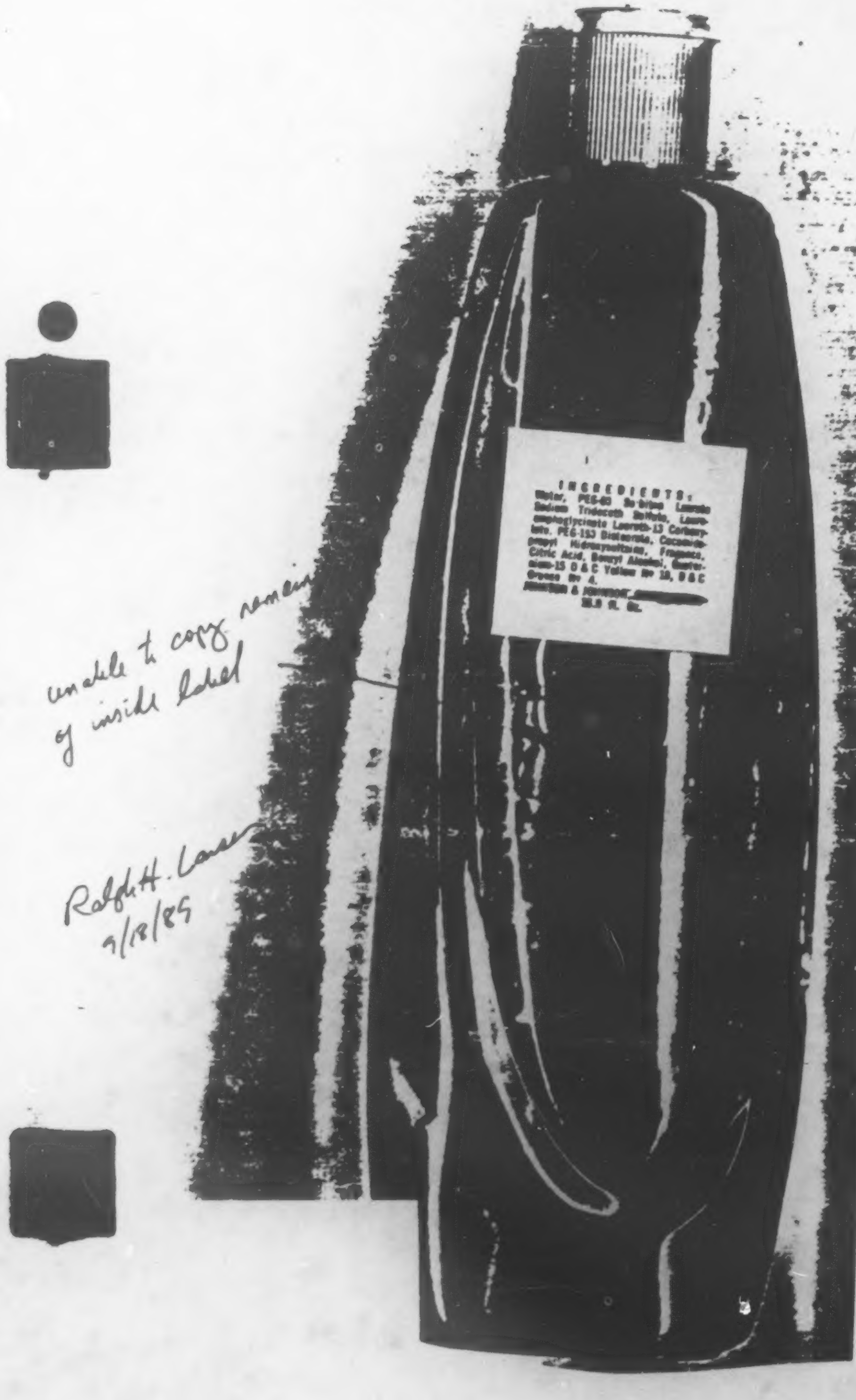
Sample received 9/18/89
from U.S. Customs, Miami, FL

Gold shampoo product in appearanc
lot #: unidentified

n suave que
on's
y
oo
hnson

Ralph H. Larsen
9/18/89

page 1 of 2



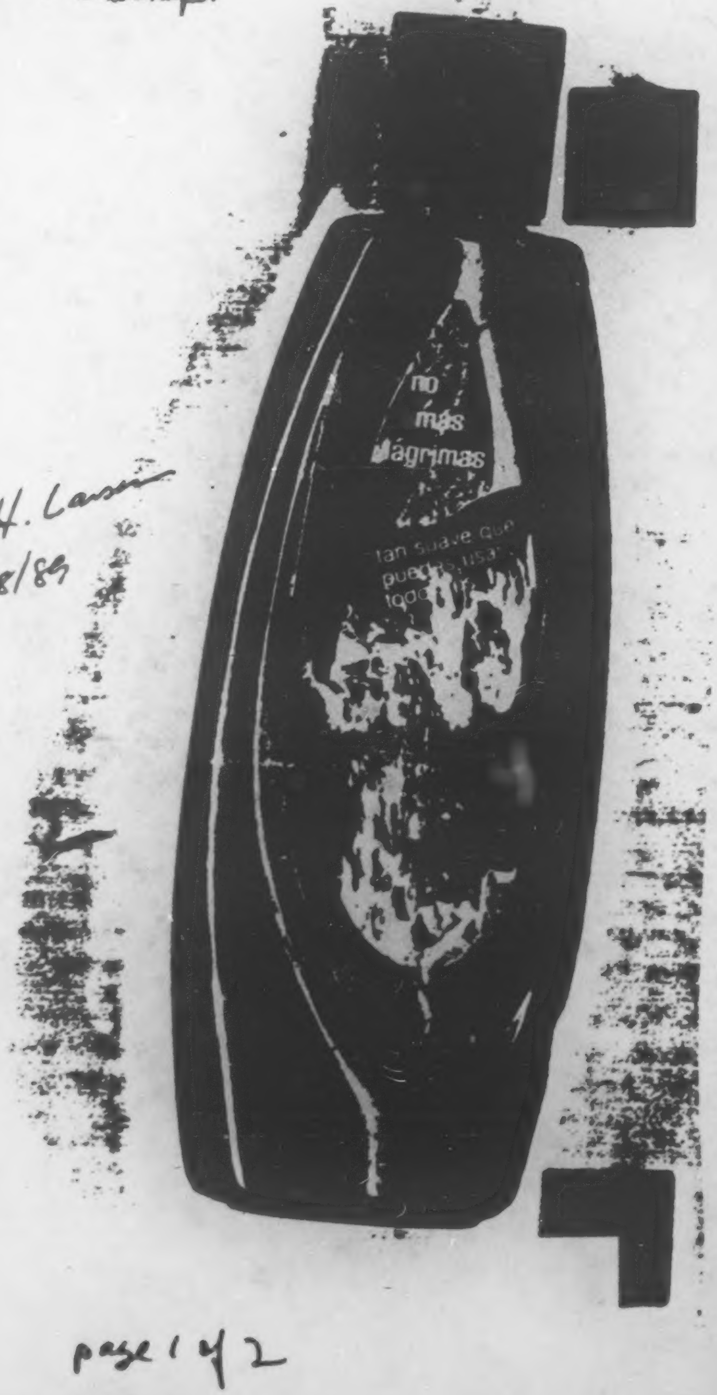
INGREDIENTS:
Water, PEG-80 Sorbitan Laurate, Sodium Trideceth Sulfate, Lauroamphoglycinate Laureth-13 Carboxylate, PEG-150 Distearate, Cocamidopropyl Hydroxysultaine, Fragrance, Citric Acid, Benzyl Alcohol, Quaternium-15 D & C Yellow No 10, D&C Orange No 4.
Johnson & Johnson [redacted]
20.0 fl. oz.

unable to copy remainder of inside label

Ralph H. Larsen
9/18/89

Sample received 9/18/89
from U.S. Customs, Miami, FL

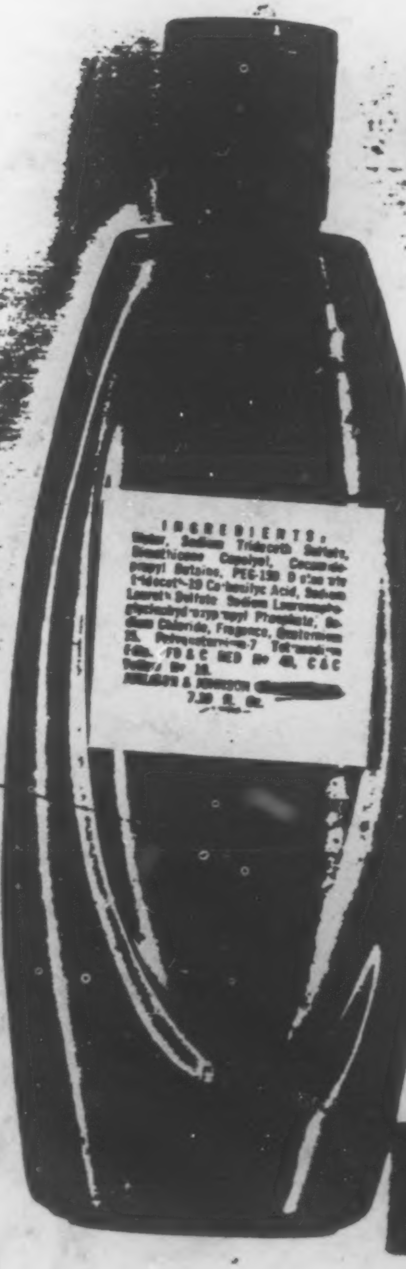
Pink shampoo product in appearance
batch #: unidentified


no
más
lágrimas
tan suave que
puedes usar

Ralph H. Larsen
9/18/89

page 1 of 2

Ralph H. Larson
9/18/84


INGREDIENTS:
Water, Sodium Trideceth Sulfate,
Dimethicone Copolyol, Cocamido-
propyl Betaine, PEG-150 [illegible]
[illegible]-10 [illegible] Acid, Sodium
Laureth Sulfate Sodium Lauroampho-
[illegible] Phosphate, So-
dium Chloride, Fragrance, Quaternium
15, Polyquaternium-7 Tetrasodium
EDTA, FD&C RED No 40, D&C
Yellow No 10.
JOHNSON & JOHNSON [redacted]
7.30 fl. oz.

unable to copy inside label

page 2 of 2

Johnson & Johnson
BABY PRODUCTS COMPANY

SKILLMAN, NJ 08558-9418

September 13, 1989

Richard G. Tallent
U.S. Customs Service
P.O. Box 13123
Port Everglades Station
Fort Lauderdale, Florida 33316

Re: - JOHNSON'S Baby Shampoo
JOHNSON'S Baby Shampoo balsamico

Dear Mr. Tallent:

Samples of the above products were received from you on September 11, 1989 and have been examined for compliance with the Food, Drug and Cosmetic Act.

With regard to the above products:

- These products are similar in appearance to the products manufactured by JOHNSON & JOHNSON de Chile S.A. The containers have been labeled with a false and misleading label by persons unknown to JOHNSON & JOHNSON. This label renders the product misbranded under the FD&C Act Sec. 602(a) [21 U.S.C. 362 (b)] because the ingredients on the label are not the ingredients of the JOHNSON & JOHNSON de Chile S.A. formulation.

- The declaration of net quantity of contents is not on the p[illegible]le display panel. This violates 21 CFR 701.13(e).

- Ingredient statement is in English only. If the label contains any representation in a foreign language, all words, statements, and other information required by or under the authority of the Act to appear on the label shall appear thereon in the foreign language. This violates 21 CFR 701.2(b)(2).

- The declaration of net quantity of contents is on the rear label. The print is the same size and color as the other printing on the rear label. The declaration is not conspicuous. This violates 21 CFR 701.13(h).

The safety of the adhesive on the back label cannot be determined because it is unknown to us.

In addition, the trademark "NO MORE TEARS WITH DOUBLE TEAR DROP DESIGN," No. 1,464,157 has been recorded with the U.S. Customs Service (see attached).

If you have any other questions regarding this material, please call me at (201) 874-1375.

Sincerely,

Ralph H. Larsen

Ralph H. Larsen
Regulatory Associate

/ls 1941A/1

cc: Therese Burke
Compliance Officer
Food and Drug Administration
P.O. Box 59-2256
Miami, FL 33159-2256

MAY 23 1988
R.F.B.

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C.

MAY 14 1988

TMK-2 CO:R:C:V
742412 L

Mr. Richard R. Biribauer
Johnson & Johnson
One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933-7001

Dear Mr. Biribauer:

As requested in your letter of January 29, 1988, the trademark "NO MORE TEARS WITH DOUBLE TEAR-DROP DESIGN," No. 1,464,157, has been recorded in this Department in the name of Johnson & Johnson, in accordance with the trademark laws.

Facsimiles of the trademark showing notice of recordation have been forwarded to Customs officers at ports and stations of entry for appropriate import protection. Copies of the notice issued are enclosed.

Sincerely,

Marvin M. Amernick

Marvin M. Amernick
Chief, Value, Special Programs
and Admissibility Branch

Enclosures

ORIGINATING OFFICE: [illegible]:C:V DISTRIBUTION: [illegible]-98

TRADEMARK

NUMBER: 88-206

EFFECTIVE DATE: 4/27/88

EXPIRES: [illegible]-10-2007

SUBJECT "NO MORE TEARS WITH DOUBLE TEAR-DROP DESIGN," (Hair Products), Classes 51 & 52, Int'l Class 3 - Recordation

REFERENCES: 15 U.S.C. 1124, 19 U.S.C. 1526. Sections 133.21 - 133.24, Customs Regulations

1. The trademark is owned by Johnson & Johnson, a corporation organized under the laws of the State of New Jersey, located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933-7001.

2. Hair products bearing the mark are manufactured and sold by the trademark owner's related firms listed in Exhibit B (copy attached).

   The information provided above and in the attachment will assist Customs officers in identifying "genuine" trademarked articles (as opposed to "counterfeits" or other copies).

   Genuine trademarked articles may be imported by anyone without restriction, insofar as Customs trademark laws are concerned.

3. No imported articles bearing copying or simulating (counterfeit, or confusingly similar), name or mark may be admitted to entry.

FILE: TMK-2-CO:R:C:V
742412 L

Marvin M. Amernick
Chief, Value, Special Programs
and Admissibility Branch

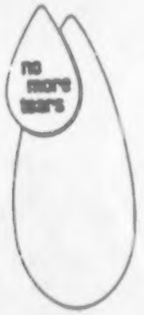
Int. Cl.: 3

Prior U.S. Cls.: 51 and 52

Reg. No. 1,464,157

United States Patent and Trademark Office Registered Nov. 10, 1987

TRADEMARK
PRINCIPAL REGISTER



JOHNSON & JOHNSON (NEW JERSEY CORPORATION)
ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, NJ 089337001

FOR: HAIR SHAMPOO, HAIR CONDITIONER, AND HAIR SHAMPOO WITH CONDITIONER, IN CLASS 3 (U.S. CLS. 51 AND 52).

FIRST USE 1-9-1959; IN COMMERCE 1-9-1959.

OWNER OF U.S. REG. NOS. 791,169 AND 1,099,979.

SEC. 2(F) AS TO "NO MORE TEARS".

SER. NO. 630,221, FILED 9-15-1986.

GARY L. SHAFFER, EXAMINING ATTORNEY

REGISTERED FOR A TERM OF 20 YEARS FROM Nov. 10, 1987

..fied to be a true copy of the registration issued by the United States Patent & Trademark Office, which registration is in full force and effect. Record title is in registrant.

ATTEST

DEC 28 1987

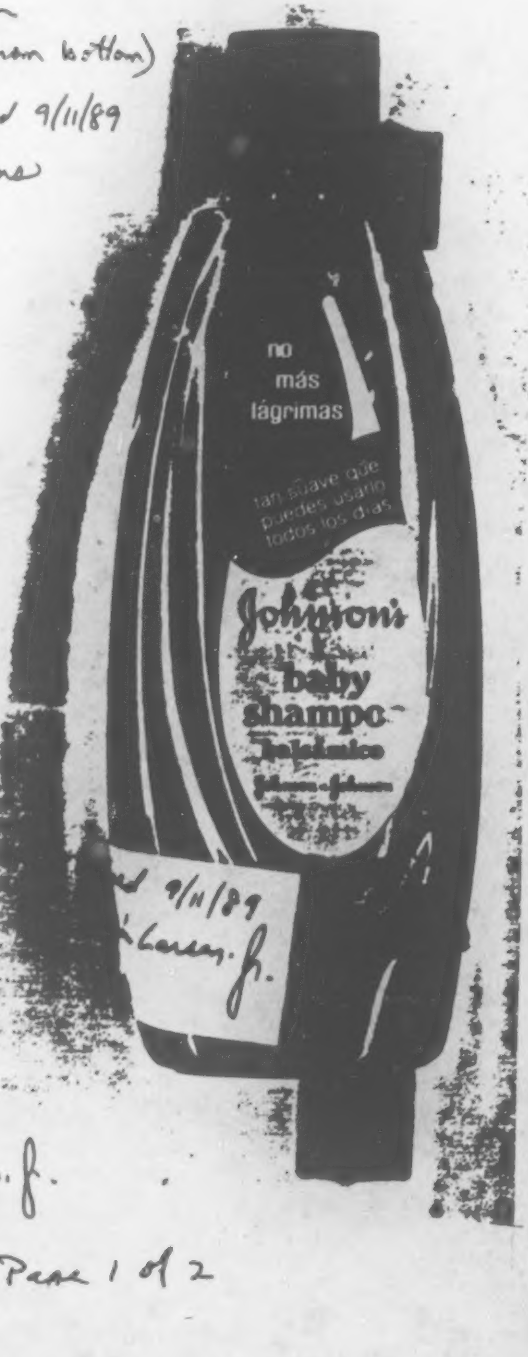
ATTESTING OFFICER

COMMISSIONER OF PATENTS AND TRADEMARKS

Johnson's baby shampoo balsámico
(Chile)

Lot #: unknown
(removed from bottom)

Sample received 9/11/89
from U.S. Customs


no
más
lágrimas
tan suave que
puedes usarlo
todos los días
Johnson's
baby
shampoo
balsámico
Johnson & Johnson
d 9/11/89
Larsen, Jr.

Ralph H. Larsen, Jr.
9/11/89

Page 1 of 2

INGREDIENTS:
Water, Sodium Trideceth Sulfate,
JOHNSON & JOHNSON Santiago Chile
7.10 fl. oz.

Unable to copy inside label

Ralph H. Larsen, Jr
9/11/89

Johnson & Johnson

SKILLMAN, N.J. 08558

4

November 17, 1987

Mr. Ron Molinaro
U.S. Customs
7300 Wingate Street
Houston, TX 77011

Dear Mr. Molinaro:

As we discussed in our telephone conversation this morning, I have attached a copy of our U.S. Customs Certificate of Recordation 86-602 for JOHNSON's Baby Powder.

Also attached is a xerox copy of the front and back labels of JOHNSON's talco para ninos manufactured by JOHNSON & JOHNSON Mexico. The back label is embossed in the mold and does not reproduce well. If it is necessary to provide an examplar of the Mexican product, please let me know.

As I pointed out, JOHNSON & JOHNSON does not import any baby products into the U.S. All product sold in the United States is manufactured here. No product should be coming into this country from Mexico.

If you need any help in determining whether or not his product is counterfeit, we will be happy to provide assistance.

If you have any questions regarding the authenticity of the product, please call me at (201)874-1337.

Thank you for your cooperation.

Sincerely,

Marjorie B. McTernan

Marjorie B. McTernan
Director, Regulatory Affairs

/lc
Attach./
cc: file
    #0612A(0029A)

ORIGINATING OFFICE: CO:R:E:E

DISTRIBUTION: P-98

TRADEMARK

NUMBER: 86-602

EFFECTIVE DATE: October 1, 1986

EXPIRES: 7-1-2006

SUBJECT: "JOHNSON'S," (Baby Powder) Class 51, Int'l Class 3 - Recordation

REFERENCES: 15 U.S.C. 1124, 19 U.S.C. 1526. Sections 133.21 - 133.24, Customs Regulations

1. The trademark is owned by Johnson & Johnson, a corporation organized under the laws of the State of New Jersey, located at One Johnson & Johnson Plaza, New Brunswick, New Jersey 08933-7001.

   (a) Genuine trademarked articles are manufactured in the countries listed in Exhibit A of the attachment.

   (b) Also attached is a list of foreign related firms authorized to use the trademark abroad.

   The information provided above and in the attachment will assist Customs officers in identifying "genuine" trademarked articles (as opposed to "counterfeits" or other copies). Genuine trademarked articles may be imported by anyone without restriction, insofar as Customs trademark laws are concerned.

2. No imported articles bearing copying or simulating (counterfeit, or confusingly similar), names or marks may be admitted to entry.

File: TMK-2-CO:R:E:E
740621 L

John F. Atwood

Acting Chief, Entry, Licensing and
Restricted Merchandise Branch

Int. Cl.: 3

Prior U.S. Cl.: 51

United States Patent and Trademark Office **Reg. No. 1,399,142**
Registered July 1, 1986

TRADEMARK
PRINCIPAL REGISTER

Johnson's

JOHNSON & JOHNSON (NEW JERSEY CORPORATION)
ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, NJ 089337001

FOR: BABY POWDER, IN CLASS 3 (U.S. CL. 51).

FIRST USE 0-0-1899; IN COMMERCE 0-0-1899.

OWNER OF U.S. REG. NOS. 396,708 AND 400,154.

SER. NO. 571,433, FILED 12-4-1985.

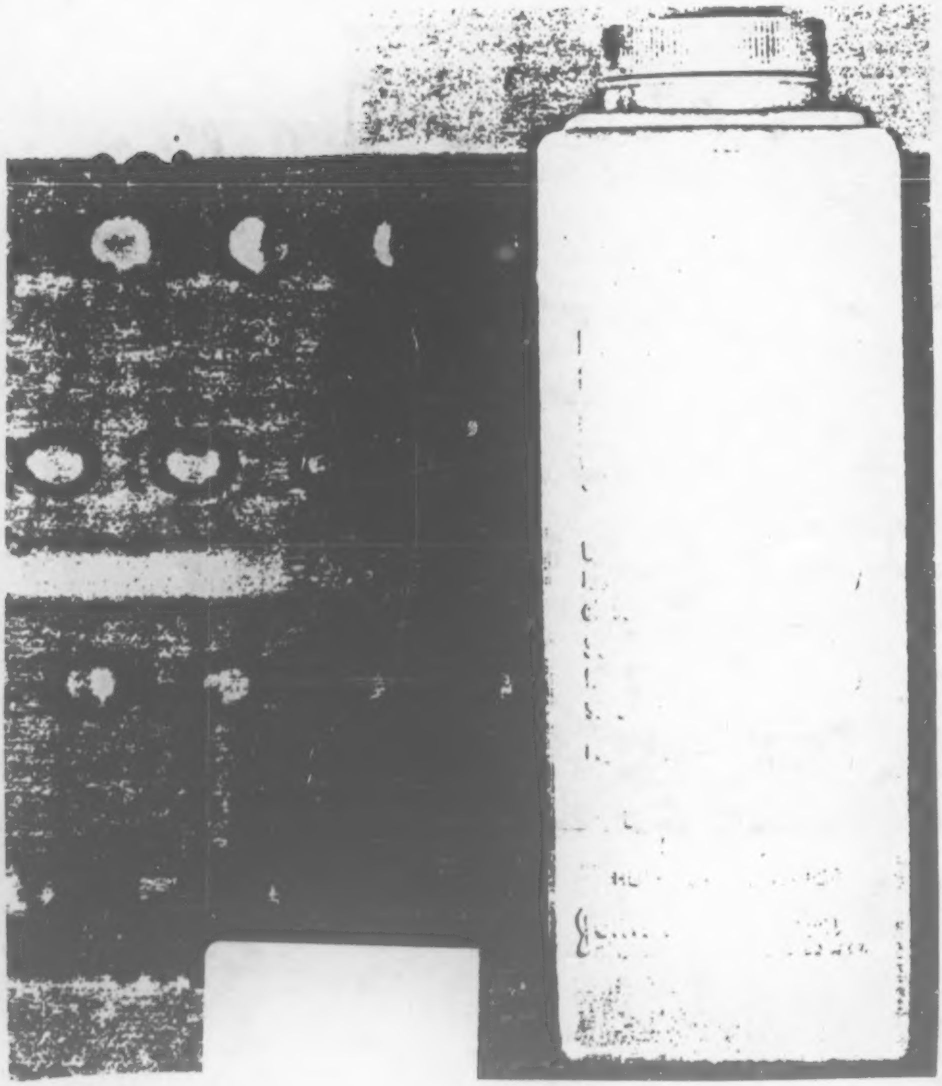
GARY L. SHAFFER, EXAMINING ATTORNEY

REGISTERED FOR A TERM OF 20 YEARS FROM July 1, 1986

Certified to be a true copy of the registration issued by the United States Patent & Trademark Office, which registration is in full force and effect. Record title is in Registrant

Attest
AUG 18 1986
R. C. Taylor
Attesting Officer

COMMISSIONER OF PATENTS
AND TRADEMARKS



Johnson's
talco
para
niños
Johnson & Johnson
CONTENIDO NETO 284g.

Johnson & Johnson
BABY PRODUCTS COMPANY

SKILLMAN, N.J. 08558

May 8, 1987

Mr. Joseph J. Faline
District Director
U.S. Food & Drug Administration
850 3rd Avenue
Brooklyn, NY 11232

Dear Mr. Faline:

I have attached a letter sent to U.S. Customs Airport Plaza, Newark explaining that the products diverted to the U.S. from Venezuela via Curacao are in violation of FD&C Act and the Fair Packaging Labeling Act as it applies to cosmetics.

I believe that it is now FDA policy to require a letter of certification from the manufacturer to determine the validity of ingredient statements on foreign manufactured product.

This certification will not be provided by Johnson & Johnson because these products are being exported without the knowledge or consent of Johnson & Johnson.

Your cooperation in this matter is greatly appreciated.

If you need additional information, please contact me at (201)874-1337.

Sincerely,

Marjorie McTernan

Marjorie McTernan
Director, Regulatory Affairs

/lm

Attach.

cc: #0193A(0029A)

Johnson & Johnson
PRODUCTS COMPANY

SKILLMAN, N.J. 08558

May 8, 1987

Mr. Anthony Caniano
Supervisory Customs Inspector
Treasury Department
Customs Region II
Airport International Plaza
Newark, NJ 07114

Dear Mr. Caniano:

The samples received from you on Monday, May 1, 1987 have been reviewed with Mr. Paul George, Director of Quality Assurance, Johnson & Johnson de Venezuela, S.A.

With regard to JOHNSON'S aceite para ninos 130 ml., the product appears to have been manufactured by Johnson & Johnson de Venezuela, S.A. The product was not sold for export, but with the understanding that the purchaser was buying the product for domestic sale in Venezuela.

This product may not enter this country legally because it is in violation of the Fair Packaging Labeling Act Section 4 U.S.C. part 1235 and Food & Drug Administration regulations 21CFR 701.12(c)(e)(d), 21CFR 701.2(b), 21CFR 701.11.

With regard to JOHNSON'S jabon para ninos, the product may not be introduced into interstate commerce because it is misbranded in violation of the FD&C Act Sec. 602(e) 21U.S.C. 362(a), Sec. 201(n) 21U.S.C. 321(n) and 21CFR 701.1(b). The labeling is false and misleading because the ingredients on the label are not the ingredients in the product.

I am sending a copy of this letter to FDA District Director, Joseph J. Faline at the Brooklyn office.

If you have any questions or require additional information, please contact me at (201)874-1337.

Thank you for your cooperation.

Sincerely,

Marjorie B. McTernan
Director, Regulatory Affairs

/lm

cc: Mr. Joseph J. Faline, FDA District Director
#0192A(0029A)

Johnson & Johnson
BABY PRODUCTS COMPANY

SKILLMAN, N.J 08558

March 11, 1986

Inspector John Day
U. S. Customs Service
2nd & Chesnut Streets
Philadelphia, Pennsylvania 19106

Dear Mr. Day:

Thank you for sending me a bottle of the diverted JOHNSON'S Baby Powder manufactured in Brazil (Lot #B9Y6), French labeling.

This product is in violation of the Federal Food Drug and Cosmetic Act which requires ingredient labeling for all cosmetics (21 CFR Sec. 701.3).

Please let me know the status of this shipment.

Thank you for your continuing cooperation.

Sincerely,

Marjorie B. McTernan
Director, Regulatory Affairs

MBM:sk

bcc: W. Egan
E. Harris
B. Semple
J. Utaski

Johnson & Johnson
BABY PRODUCTS COMPANY

SKILLMAN, N.J. 08558

February 19, 1986

Mr. John Day
Inspector
U.S. Customs, Room 102
Second and Chestnut Streets
Philadelphia, PA 19106

Dear Mr. Day:

Per our telephone discussion this morning, I have attached a copy of the telex from JOHNSON & JOHNSON Brazil indicating the status of this shipment.

It is my understanding that United States Customs will hold this shipment until JOHNSON & JOHNSON can investigate how product exported to Benin, West Africa was diverted into the United States.

Please let me know if the Brazilian trading company contacts you.

Thank you for your cooperation.

Sincerely,

Marjorie B. McTernan

Marjorie B. McTernan
Director, Regulatory Affairs

MBM:mmn

Attachment

BK 2 PAGE 528
MESSAGE # 2278
RCV LN 2

RECEIVED
FEB 18 1986
MARJORIE McTERNAN

219327 JJBP UR

RCA FEB 18 0906
1130810JJOH BR

TLX NR 01292
FEBRUARY 18, 1986

O/RE.: D.E. 707/86

ATTN: MARJORIE MCTERNAN
DIRECTOR REGULATORY AFFAIRS

RE.: JOHNSON 'S BABY POWDER 400 GR.
YR TLX OF FEB 14 TO MR. POMMEZ

1. YES, THE 2,200 CARTONS OF 20 BOTTLES EACH IS GENUINE AND IT WAS PRODUCED SPECIALLY TO BE EXPORTED TO BENIN (W.AFRICA) THROUGH A BRAZILIAN TRADING COMPANY AS INVOICE AND EXPORT PERMIT. FOR YOUR INFO FROM THIS VOLUME, 33 CASES ARE IN FRENCH TEXT AND ONLY THE BALANCE (17 (CASES) IN PORTUGUESE.
2. WE'VE INQUIRED THE TRADING COMPANY AND THEY WERE SURPRISED THAT THE MERCHANDISE WAS DISCHARGED IN USA. ONE OF THEIR DIRECTORS TRAVELLED YESTERDAY TO USA IN ORDER TO TRY TO RE-DISPATCH THE MERCHANDISE TO BENIN.

WILL KEEP YOU INFORMED.
BEST REGARDS,
VIRGILIO R.S. MARTINS
EXPORT DIVISION, MGR.
JANDO BRAZIL
011 22677 JJOH BR

CC: MESSRS: P.POMMEZ
G.C.CILENTO
C.CELENTANO

219327 JJBP UR

1130810JJOH BR
GSGG*1\
DURATION 195 SECS LISTED 1755 ???03-18-00

PG 533 IS NEXT

Johnson & Johnson
BABY PRODUCTS COMPANY

SKILLMAN, N.J. 08558

October 15, 1985

Ms. Eleanor McCarron
Compliance Officer
Food & Drug Administration
Room 900
U.S. Customs House
2nd & Chesnut Street
Philadelphia, Pennsylvania

RE: JOHNSON'S locão cremosa para bebé
JOHNSON & JOHNSON Lda., Portugal

Dear Ms. McCarron:

Per our telephone conversation of October 11, 1985, I am providing you with a list of ingredients for the JOHNSON & JOHNSON Lda., Portugal, lotion formulation. This declaration is made in confidence and is considered PROPRIETARY TRADE SECRET information, not to be disclosed to anyone without the written consent of JOHNSON & JOHNSON.

If you have any other questions regarding the diverted lotion product, please call me at (201) 874-1337.

Please let me know the disposition of this product.

Sincerely,

Marjorie B. McTernan
Director, Regulatory Affairs

MBM:sk
Attachment

Johnson & Johnson

BABY PRODUCTS COMPANY

SKILLMAN, N.J. 08558

September 30, 1985

Mr. Charles McCollum
U. S. Customs Service
2nd & Chesnut Street
Philadelphia, Pennsylvania 19106

RE: JOHNSON'S talco para criancas
JOHNSON & JOHNSON s.a. Brazil

Dear Mr. McCollum:

We have analyzed the powder in these samples and found that it contains two forms of talc used by JOHNSON & JOHNSON, Brazil.

The container has been overlabeled with a false label, unauthorized by JOHNSON & JOHNSON, which constitutes infringement of our registered trademark.

The product is misbranded under the FD&C Act, Sec. 602(b) [21 U.S.C. 362(b)] 21 CFR 701.12(c) (d) because the address and ZIP Code of the manufacturer, packer or distributor is not on the label.

In addition, all JOHNSON & JOHNSON baby products manufactured and sold in the United States are sealed with a tamper-evident band and instructions to the consumer not to purchase if seal is broken or missing.

We feel that the unauthorized importation and sale of this product is deceptive to the United States consumer because the source of talc and the fragrance used are not the same as in the U.S. formulation of JOHNSON'S Baby Powder.

If you have any further questions or comments, please call me at (201) 874-1337.

Sincerely,

Marjorie B. McTernan

Marjorie B. McTernan
Director, Regulatory Affairs

U.S. CUSTOMS SERVICE
2ND + CHESTNUT STS
PHILA, PA 19106
AUGUST 29th 1985
TELEPHONE 1-215-597-4665

MAJORIE McTERNAN:

Enclosed are additional samples of products discovered during a Custom's examination. These samples are from a shipment destined for the same importer as the samples previously sent.

I spoke to Mr Loren Stein and he recommended that you receive additional samples since these have a different origin.

I would appreciate your help in determining whether these samples contain your product or if they might contain any impurities NOT found in such a product for Consumption in the U.S. market.

Thank you for your assistance and for all your efforts regarding our previous mailing

Sincerely,
Charles McCollum

11410

EARCH & DEVELOPMENT
ALYTICAL REQUEST AND REPORT

ANALYTICAL LOG NO.: 85-1034

UBMITTED BY: W.ASHTON

DATE: SEPT 9,85

JECT NAME: BABY POWDER BRAZIL

PROJECT NUMBER: 2541

SAMPLE IDENTIFICATION: SAMPLE CODED A2Y25

ANALYSIS REQUESTED – REMARKS

DATE NEEDED BY: WITHOUT DELAY

EXAMIN SAMPLE FOR FREEDOM FROM ASBESTOS MINERALS BY OPTICAL MICROSCOPY. DETERMINE WHETHER TALC IS REASONABLE MATCH TO REFERENCE SAMPLE FROM BRAZIL. BRAZIL NORMALLY USES TWO SOURCES LOCALLY AND MAY BE A BLEND OF EACH.

ADVISE BREAKDOWN OF BRAZILIAN CODE ON BOTTOM OF PACCKAGE IF POSSIBLE.

SAMPLE IS OVERLABELED IN PAPER AND HAS HIT THE US MARKET LATELY.

REPRT RESULTS TO MRS M. McTiernan

TAKE OUT FEW GRAMS FOR TEST AND RETURN BOTTLE TO MRS M. TODAY.

TEST	TEST METHOD	APPROX. CONC. OR SPEC.	RESULTS	ANALYST/REF.
Microscopy	The talc is white, slaty, lubricious and free of asbestiform mat. Physical characteristics and optical microscopy strongly indicate the talc to be Brazilian Magnesita, one of the two raw talcs being used by J&J Brazil.			912-92 J.S. ↓

ED BY: GMRivers

DATE RECEIVED: 9-9-85

DATE COMPLETED: 9-11-85

FORM 730-4 REV. 6/64

©JOHNSON & JOHNSON BABY PRODUCTS CO. 1977

CC:

COPY DISTRIBUTION: WHITE - Central File; GREEN - Report Copy; CANARY - Dept. File Copy; PINK - Lab File Copy; GOLDENROD - Originator

Johnson & Johnson

BABY PRODUCTS COMPANY

SKILLMAN, N.J. 08558

August 27, 1985

Ms. Eleanor McCarron
Compliance Officer
Food & Drug Administration
Room 900
U.S. Customs House
2nd & Chesnut Street
Philadelphia, Pennsylvania

RE: Samples No. 525389, 525392, 525394

Dear Ms. McCarron:

Per our telephone conversation of August 26, 1985, samples of diverted Portugese product have been examined for compliance with the FD&C Act.

With regard to the shampoo product, sample number 525392:

This product has a batch code on the bottom of the container similar to product manufactured by JOHNSON & JOHNSON, Lda., Portugal. The container has been labeled with a false and misleading label by persons unknown to JOHNSON & JOHNSON. This label renders the product misbranded under the FD&C Act Sec. 602(a) [21 U.S.C. 362(a)] because the ingredients are not the ingredients of the JOHNSON & JOHNSON, Lda. formulation.

All three products (Sample No.'s 525389, 525392, 525394) are misbranded under the FD&C Act Sec. 602(b) [21 U.S.C. 362(b)] 21 CFR 701.12(c) because the address and ZIP Code of the manufacturer, packer or distributor is not on the label.

We do not know the adhesives used in the false labels, which in the case of the oil and shampoo products, appear to react with the bottles.

In addition, the oil product (#525389) is labeled with an unauthorized label containing the "No More Tears" teardrop. The words "pure and gentle" appear in the teardrop which constitutes an infringement of our registered trademark (see attached).

Also attached is a list of the actual ingredients in the JOHNSON & JOHNSON, Lda., Portugal shampoo formulation. This declaration is made in confidence and is considered PROPRIETARY TRADE SECRET information, not to be disclosed to anyone without the written consent of JOHNSON & JOHNSON.

If you have any other questions regarding this material, please call me at (201) 874-1337.

Sincerely,

Marjorie B. McTernan
Director, Regulatory Affairs

MBM:sk

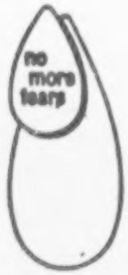
Attachments (2)

United States Patent Office

791,169
Registered June 15, 1965

PRINCIPAL REGISTER
Trademark

Ser. No. 201,833, filed Sept. 1, 1964



Johnson & Johnson (New Jersey corporation)
501 George St.
New Brunswick, N.J.

For: BABY SHAMPOO, in CLASS 52.
First use Jan. 9, 1959; in commerce Jan. 9, 1959.

Affidavit filed
Sections 8 and 15

Johnson & Johnson
BABY PRODUCTS COMPANY

SKILLMAN, N.J. 08558

July 19, 1985

Mr. Robert Colandra
U. S. Customs
Routes 1 & 9 South
Newark, New Jersey 07114

Re: Products labeled JOHNSON'S Óleo para bebé,
JOHNSON'S Champo para bebé and JOHNSON'S Talco para bebé.
Samples received from U. S. Customs July 16, 1985

Dear Mr. Colandra:

Johnson & Johnson Baby Products Company has determined that the batch numbers on these products are representative of products originally manufactured by Johnson & Johnson, Lda. Portugal. Because of the absence of tamper evident seals, we cannot give assurances that the content of these containers was actually manufactured by Johnson & Johnson, Lda. They obviously have been relabeled with labeling unauthorized by Johnson & Johnson, in a facility unknown to Johnson & Johnson, by persons unknown to Johnson & Johnson.

We submit that all three products are misbranded under FD&C Act (Sec. 602(b), 21 U.S.C. 362(b), 21 CFR 701.12, 21 CFR 701.13(a)(b) because they do not contain the address and ZIP Code of the manufacturer, packager or distributor and the quantity statements are in ounces not fluid ounces.

The shampoo product is misbranded under 21 CFR 701.3(a)(f), if the contents were manufactured by Johnson & Johnson, Lda. Portugal. The ingredient labeling is false and misleading because the ingredients are not the ingredients of the Johnson & Johnson, Lda. formulation.

In addition, we submit that the unauthorized labels constitute infringement of the Johnson & Johnson registered trademarks (copies attached).

Mr. Robert Colandra
U. S. Customs
July 19, 1985
Page 2

We would also make you aware that JOHNSON'S Baby Lotion and JOHNSON'S Baby Cream, manufactured in the United Kingdom and Portugal contain Red Dye No. 2 (formerly FD&C Red No. 2) which has been declared an unsafe color additive by the U.S. Food and Drug Administration. The presence of Red Dye No. 2 in foods, drugs or cosmetics renders the product adulterated. The introduction of these products into the United States is illegal under FD&C Act Sec. 301 [331] (a)(b)(c), Sec. 706(a), 21 U.S.C. 376(a), and Sec. 706(b) 21 U.S.C. 376(b).

If you require additional information, please call me at (201) 874-1337.

Sincerely,

Marjorie B. McTernan
Director, Regulatory Affairs

MBM:ak

Attachments

bcc: P. Bewley
R. Biribauer
W. Egan
B. Semple
J. Utaski

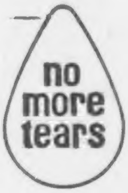
Int. Cl.: 3

Prior U.S. Cl.: 51

United States Patent and Trademark Office

Reg. No. 1,099,979
Registered Aug. 22, 1978

TRADEMARK
Principal Register



Johnson & Johnson (New Jersey corporation)
501 George St.
New Brunswick, N.J. 08903

For: BABY BATH SKIN CLEANSER, in CLASS 3 (U.S. CL. 51).

First use Apr. 13, 1977; in commerce Apr. 13, 1977.

Owner of Reg. No. 961,705.

Ser. No. 155,821, filed Jan. 19, 1978.

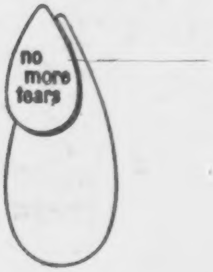
M. MERCHANT, Examiner

United States Patent Office

791,169
Registered June 15, 1965

PRINCIPAL REGISTER
Trademark

Ser. No. 201,033, filed Sept. 1, 1964



Johnson & Johnson (New Jersey corporation)
501 George St.
New Brunswick, N.J.

For: BABY SHAMPOO, in CLASS 52.
First use Jan. 9, 1959; in commerce Jan. 9, 1959.

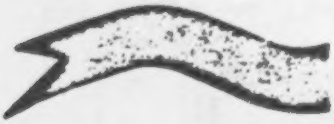
Affidavit filed
Sections 8 and 15

United States Patent Office

971,537
Registered Oct. 23, 1973

PRINCIPAL REGISTER
Trademark

Ser. No. 450,024, filed Feb. 28, 1973



Johnson & Johnson (New Jersey corporation)
501 George St.
New Brunswick, N.J. 08903

For: BODY LOTION, OIL, POWDER AND CREAM, in CLASS 51 (INT. CL. 3).

First use Oct. 4, 1960; in commerce Oct. 4, 1960.

Owner of Reg. Nos. 88,088 and 933,674.

M. MERCHANT, Examiner

REGISTRATION NO 971,537 Oct. 23, 1973
ISSUED
12-C PUB

RECEIPT IS HEREBY ACKNOWLEDGED OF THE AFFIDAVIT FILED

BY Johnson & ~~[illegible]~~ Johnson

ON Sept. 21, 1979

☒ SEC. 8 - AFFIDAVIT ACCEPTED
☐ SEC. 15 - AFFIDAVIT FILED

BY DIRECTION OF THE COMMISSIONER

5 MAR 1980

bw

DIRECTOR, TRADEMARK EXAMINING OPERATION

FORM PTOL-130 A (REV. 8-78)

AFFIDAVIT ACKNOWLEDGEMENT

Richard F. Biringauer, Legal Dept.
c/o Johnson & Johnson
501 George Street
New Brunswick, N. J. 08903

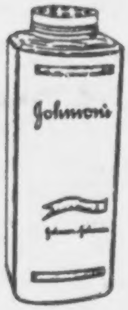
U.S. DEPARTMENT OF COMMERCE - PATENT AND TRADEMARK OFFICE

United States Patent Office

933,674
Registered May 9, 1972

PRINCIPAL REGISTER
Trademark

Ser. No. 396,980, filed Aug. 13, 1971



Johnson & Johnson (New Jersey corporation)
501 George St.
New Brunswick, N.J. 08903

For: BABY POWDER, in CLASS 51 (INT. CL. 3).

First use at least as early as July 18, 1963; in commerce at least as early as July 18, 1963.

Applicant disclaims the configuration of the conventional container per se.

The drawing is lined for the color pink.

Owner of Reg. Nos. 677,465 and 737,997.

MABEL MERCHANT, Examiner

REGISTRATION NO
933674

ISSUED
MAY 9 1972
18-C PUB

RECEIPT IS HEREBY ACKNOWLEDGED OF THE AFFIDAVIT FILED
BY JOHNSON & JOHNSON
ON JAN 24, 1978

☒ SEC. 8 - AFFIDAVIT ACCEPTED
☒ SEC. 15 - AFFIDAVIT FILED

BY DIRECTION OF THE COMMISSIONER
14 MAR 1978
jtw
DIRECTOR, TRADEMARK EXAMINING OPERATION

FORM PTOL-[illegible] A
(REV. [illegible])
AFFIDAVIT ACKNOWLEDGEMENT

Norman St. Landau, et al.
501 George St.
New Brunswick, N.J. 08903

U.S. DEPARTMENT OF COMMERCE - PATENT AND TRADEMARK OFFICE

Affidavit, Section 8 - Accepted Date: 3/14/78

Section 15 - Accepted Date: 3/14/78

Reg. No. 1,119,048

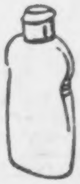
Int. Cl.: 3

Prior U.S. Cl.: 51

United States Patent and Trademark Office

Reg. No. 1,119,048
Registered May 29, 1979

TRADEMARK
Principal Register



Johnson & Johnson (New Jersey corporation)
501 George St.
New Brunswick, N.J. 08903

For: OIL FOR PROTECTING, SOOTHING, OR LUBRICATING THE SURFACE OF THE BODY, in CLASS 3 (U.S. CL. 51).

First use November 1966; in commerce November 1966.

Owner of Reg. No. 709,468.

Ser. No. 160,697, filed Mar. 3, 1978.

M. MERCHANT, Examiner

REGISTERED FOR A TERM OF 20 YEARS FROM May 29, 1979

Certified to be a true copy of the registration issued by the United States Patent & Trademark Office, which registration is in full force and effect. Record title is in Registrant

Attest:
APR 15 1982
Attesting Officer

COMMISSIONER OF PATENTS & TRADEMARKS

Registered Feb. 16, 1943

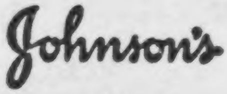
Trade-Mark 400,154

UNITED STATES PATENT OFFICE

Johnson & Johnson, New Brunswick, N. J.

Act of February 20, 1905

Application October 1, 1942, Serial No. 455,887



STATEMENT

To the Commissioner of Patents:

Johnson & Johnson, a corporation duly organized under the laws of the State of New Jersey and located at New Brunswick, New Jersey, and doing business at 501 George Street, New Brunswick, New Jersey, has adopted and used the trade-mark shown in the accompanying drawing, for BABY OIL, Class 6, Chemicals, medicines, and pharmaceutical preparations, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the act of February 20, 1905, as amended.

The trade-mark has been continuously used and applied to said goods in applicant's business since March 19, 1935.

The trade-mark is applied or affixed to the goods, or to the packages containing the same by printing it upon the packages or by placing thereon a printed label or by lithographing the mark directly upon the cartons.

Applicant is the owner of the following registrations: 88,096, Aug. 27, 1912; 92,878, July 22, 1913; 97,476, June 9, 1914; 98,057, June 30, 1914, and 99,101, Aug. 18, 1914, all effected on the ground of actual and exclusive use by the applicant of the marks shown therein on the goods recited in said registrations as trade-marks for ten years next preceding February 20, 1905; and that the mark has been used by the applicant on the articles named in the foregoing statement in interstate commerce for at least one year.

The undersigned hereby appoints George H. Lorch, register No. 12,194, whose postal address is 501 George Street, New Brunswick, New Jersey, its attorney, to prosecute this application for registration, with full powers of substitution and revocation, and to make alterations and amendments therein, to receive the certificate and to transact all business in the Patent Office connected therewith.

JOHNSON & JOHNSON,
By JAMES DESHLER, II,
Assistant Secretary.

United States Patent Office

620,110
Registered Jan. 24, 1956

PRINCIPAL REGISTER
Trademark

Ser. No. 664,446, filed Apr. 13, 1954

Johnson's

Johnson & Johnson (New Jersey corporation)
501 George St.
New Brunswick, N. J.

For: SHAMPOO, in CLASS 52.
First used Mar. 12, 1953; in commerce Mar. 12, 1953.
Sec. 2(*f*).
Owner of Reg. Nos. 88,068, 568,206, and others.

missioner of
n . unless
six years, the
hat said mark
circumstances
n to abandon

United States Patent Office

677,465
Registered Apr. 21, 1959

PRINCIPAL REGISTER
Trademark

Ser. No. 38,995, filed Oct. 16, 1957

JOHNSON'S

Johnson & Johnson (New Jersey corporation)
501 George St.
New Brunswick, N.J.

For: BABY POWDER, in CLASS 51.
First use 1894; in commerce 1894.
Sec. 2(f).
Owner of Reg. Nos. 88,088, 637,311, and others.

STATEMENT OF ROBERT J. MAXWELL

PRESIDENT
NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS, INC.

HEARINGS ON S. 626
BEFORE THE SUBCOMMITTEE ON
PATENTS, COPYRIGHT AND TRADEMARKS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

APRIL 4, 1990

SUBMITTED APRIL 30, 1990

My name is Robert J. Maxwell. I am President of the National Association of Beverage Importers, Inc., (NABI) an association which represents U.S. corporations responsible for more than 90% of the alcohol beverages imported into the United States each year. The purpose of this statement is to express NABI's strong support for S. 626 and to thank Chairman DeConcini and Senator Hatch for making elimination of the gray market one of their prime legislative goals in the 101st Congress.

Mr. Chairman, unless S. 626 becomes law, the imported alcohol beverage industry will continue to be severely and unfairly damaged by those who gray market only its finest and most popular brands. The fact that gray marketers target only the alcohol industry's premier products proves once again that their intent is to take unfair advantage of NABI members' multimillion dollar brand advertising and brand promotion programs - - programs that, over the years, have created the image, cache and reputation for quality that attracts brand- conscious consumers. This practice is commonly called "free riding." Passage and implementation of S. 626 would put and end to it, once and for all.

The concept of "free riding" is permissible because of the U.S. Customs Service's peculiar interpretation of Section 526 of the Tariff Act of 1930. This section read alone states very clearly that it is unlawful to import foreign products bearing U.S. registered trademarks without the consent of the U.S. trademark owner. Yet for the last 20 years, Customs has refused to enforce this provision except where the U.S. trademark owner is not owned by or affiliated with foreign owners of the same trademark.

It is important to note that the law does not require that Customs treat foreign affiliated U.S. trademark holders differently from others. The U.S. Supreme Court stated in the COPIAT case (K MART Corp. v. Cartier, Inc. 108 S. Ct. 1811 (1988), that the Tariff Act of 1930 was worded so ambiguously, the Customs Service is free to continue or reverse its practice of exempting foreign owned or affiliated trademarks from protection at the border.

It is NABI's strongly held opinion that the Customs Service cannot justify its distinction between independent and foreign owned or controlled U.S. corporations with regard to protection of trademark rights at the border.

In the alcohol beverage industry, both types of corporations spend hundreds of millions of dollars each year in the United States promoting and advertising their high value, trademarked products. Gray marketers spend virtually no money on advertising or promotion. When a gray marketer attempts to devalue the advertising and promotion efforts of an independent U.S. trademark holder by importing and distributing the trademark holder's most popular brands, he is stopped at the border by Customs and his product is turned away unless the trademark holder gives his consent to the importation. Yet a foreign-owned or controlled U.S.

corporation holding the identical trademark property rights can expect no help from Customs when a gray marketer decides to target their most successful brands.

Fortunately, the difference in the level of U.S. government protection provided to an independent U.S. corporate trademark holder and one that is foreign owned or controlled does not apply to a corporation's rights in real property, stock certificates, or bank deposits. Yet, a common sense analysis of U.S. trademark law would suggest that registration of a trademark with the U.S. Office of Patents, Copyrights and Trademarks by a U.S. corporation would signify a meaningful level of protection for that property right whether or not the corporation was independant or foreign-owned. Under current Customs regulations, this is simply not the case.

Customs position is all the more disturbing when considered in light of the aggressive position the U.S. Government is taking around the world with regard to protection for intellectual property rights which include trademarks. The Government has utilized or threatened utilization of trade sanctions against foreign governments that do not have adequate intellectual property protection provisions in their law. The United States Trade Representative has compiled a list of Special 301 countries that are suspect in the area of intellectual property protection. Finally, the U.S. is fighting hard in the GATT Uruguay Round for stronger international standards for protection of intellectual property. None of this can be reconciled with the Customs position on the gray market.

CONSUMER CONCERNS

There are a number of reasons that the Congress, the Administration and consumers should be outraged at the way gray marketers do business in the alcohol beverage sector.

Gray marketers are not particularly concerned about the labeling or presentation of the products they import as long as the well-known brand name is easily seen by the consumer. As a result, important consumer information required by regulation to appear on the label in English will instead appear in a foreign language. Such foreign language presentation of mandatory label information is obviously illegal under the regulations of the Bureau of Alcohol, Tobacco & Firearms (BATF), the agency that governs the marketing of alcohol beverages at the federal levels in the United States. However, neither Customs nor the BATF has the resources necessary to detect such defects in every shipment of alcohol beverages that reaches U.S. ports and prevent their entry.

Other gray marketers will attempt to comply with BATF marking and labeling regulations by using something called "strip" stamps or labels to replace information printed in a foreign language or prohibited by U.S.

Incorrect, shoddy, or incomplete labeling of high value imported alcohol beverages not only facilitates "free riding" on the authorized importer's investment in his brand, but also damages the brand in the eyes of the consumer. Any noticeable difference between the gray market product and that brought in through the authorized importer confuses, deceives, and disappoints the consumers who have been buying the product for many years with the same expectations of quality, consistency and genuineness. In the worst case, the consumer sees a product that is labeled differently, or relabeled with strip labels in a way that makes it appear like a discard or a "second," and is sitting on the shelf next to a properly labeled version of the same product. The opportunities for confusion and doubt in a careful shopper's mind are obvious.

The fact that Customs refuses to prevent the importation of gray market goods also makes agency detection of counterfeit goods in all categories more difficult. Gray market importations have been known to facilitate entry of counterfeit soaps, shampoos, perfumes and other personal articles that can pose a significant threat to the general health and welfare of the population.

While the alcohol beverage industry has no reason to believe there is an issue of counterfeit alcohol beverages in the United States, reports indicate that such problems have occurred in other major consuming nations. The United States should not consider itself immune to this threat.

Just as importantly, Customs policy greatly complicates the BATF's task of tracing imported alcohol beverages back to the original importers of record for purposes of prosecuting regulatory violations or ordering the recall of a product.

S. 626 AS A SOLUTION

S. 626 is, in essence, a "demarking" statute. NABI has in the past, and does now, strongly support the concept of demarking as a solution for the gray market problem.

S. 626 would provide that, absent the consent of a U.S. trademark owner, no person may import into or sell within the United States any good that is manufactured outside the United States "if that good, or any label, sign, print, package, wrapper, or receptacle intended to be used upon or in connection with the sale, offering for sale, or distribution of that good" bears a trademark that is identical or substantially similar to a registered trademark owned by a citizen of the United States or a corporation or other entity created under the laws of the United States.

In the imported alcohol beverage sector this would mean the complete removal of the trademark or protective label design from the bottle, neck labels, seals and closures. It would also require the removal of registered trademarks from all packaging and boxes accompanying the bottle and meant for consumer consumption.

It is important and only fair to note that this statute would not prohibit the importation of goods manufactured abroad bearing U.S. trademarks. It would simply not allow those goods to be imported until those trademarks had been removed in a permanent way. It would also serve to remove misinformation from the shelves of alcohol beverage retailers' around the country--misinformation in the form of gray market alcohol beverages labeled, packaged and presented in a way that was not intended for the United States market and therefore confuses, deceives and disappoints the American consumer.

The final result of passage and implementation of S. 626 will be fair and honest interbrand competition between authorized importers of alcohol beverages and a wide variety of safe, properly marked, quality alcohol beverages for all consumers to choose from. This proposal deserves the full support of the Committee, the Congress and the Administration.

National
Consumers
League
Founded 1899

815 15th Street NW • Suite 516 • Washington, DC 20005 • (202) 639-8140

Linda F. Golodner, Executive Director

STATEMENT OF LINDA F. GOLODNER
EXECUTIVE DIRECTOR, NATIONAL CONSUMERS LEAGUE
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
IN SUPPORT OF S. 626
APRIL 4, 1990

Officers: Robert R. Nathan, Honorary Chairman • Esther Peterson, Honorary President • Jack Blum, President • Ruth Jordan, Vice President • Bert Seidman, Vice President • Jane King, Secretary • Barbara Warden, Treasurer

Statement of Linda F. Golodner, Executive Director
National Consumers League

Before the Subcommittee on
Patents, Copyrights and Trademarks
Committee on the Judiciary
United States Senate

In Support of S.626
April 4, 1990

Mr. Chairman and members of the Subcommittee, my name is Linda Golodner, Executive Director of the National Consumers League, America's pioneer consumer organization. Throughout its 91-year history, the League has advocated for economic and social justice for consumers and workers in the marketplace and workplace.

The National Consumers League greatly appreciates the commitment of this Subcommittee to resolve what we believe to be a serious problem -- the gray market. Enactment of the Trademark Protection Act of 1989, S. 626, is critical to protect the health and safety of United States consumers.

One important purpose of the U.S. trademark system is to protect consumers from confusion and deception. This precept is violated by gray market goods that pose health and safety risks by their failure to comply with U.S. safety standards, by their improper labeling and by the inability of the manufacturer to monitor the use of these products.

The National Consumers League is not alone in its effort to warn consumers about the confusion, deception and health and safety risks posed by the gray market. For example, Betty Furness, consumer reporter of NBC, has stated:

> "(The gray market) is the sale of goods with genuine brand names, but which were not intended for sale in the United States. It's actually legal, but it can hurt consumers badly."

News Four, New York (WNBC television broadcast, Sept. 20, 1985).

Family Circle has warned:

> "Beware of bargains in the gray market. What's wrong is that gray market merchandise doesn't always come with a valid warranty because it is made overseas for European distribution. . . . You'll have to pay for the repair yourself, which could end up costing you most of the money you saved."

See Molly Sinclair, "Beware of Bargains in the Gray Market," Family Circle, July 2, 1985.

Similarly, columnist Sylvia Porter has warned of gray market products which are not covered by warranties by a U.S. authorized distributor; of damaged batteries; of foreign language instructions; products that do not meet U.S. environmental laws; and potential safety problems with foods, pharmaceuticals and cosmetics. In light of these serious consumer problems she has advised her readers that "gray goods aren't necessarily bargains." Sylvia Porter, "'Gray Goods Aren't Necessarily Bargains," Daily News, June 26, 1985.

The National Consumers League believes that Consumers should be educated about the health and safety risks posed by gray market products and has prepared a brochure to assist the general public in dealing with these critical concerns.

We hope to educate consumers nationwide about the differences between gray market goods and authorized products and their harmful affects. However, educating the consumer is not enough. We need trademark legislation to adequately protect the consumer.

When a consumer buys any product, he or she expects quality, reliability, safety, and service. The consumer also expects a certain texture, a certain taste, a certain solubility, a certain lather, or a certain durability. The consumer assumes that goods they purchase will conform to strict and uniform standards.

Documented consumer problems with gray market goods run the gamut from non-conforming merchandise and illegal ingredients to lack of factory authorized warranty and other post-sale services. Consumer problems with the gray market have prompted New York City and several states to enact legislation requiring that consumers be warned about the pitfalls of gray market products. Without federal legislative action to prohibit the importation of gray market goods, consumers will continue to write the following letters:

> "So, I placed the order. . . and when it finally arrived -- none of the equipment (camera, lens, or flash unit) had warranties . . . and in addition, I found that I had been overcharged on my Visa number, by $53.00." W.S., Cincinnati, Ohio
>
> I feel that I was misled in that your ads make no mention that you are not an authorized importer. In addition, my owner's manual is printed in French, and even though some parts of the East may not admit it, Colorado has been part of the United States for over 100 years, and English is our primary language." G.C., Durango, Colorado
>
> "I have been advised by the jewelers the watch was not made for distribution in this country; therefore, the parts for it are not available locally." M.W., Tulsa, Oklahoma
>
> "Much to my dismay, I have been plagued with problems. . . . Soon after purchase, the power cell died. I replaced it and twice thereafter. Each new power cell, including the one that was provided . . . at the time of purchase survived for no more than approximately thirty days." S.V., New York, New York
>
> "I am totally confused!!! I purchase a "quality" watch from a legitimate store, yet I can't have it serviced by the manufacturer . . . How can you advertise that this is the best and yet not service it? To me this is defrauding the public unless something is done." M.S., Des Plaines, Illinois
>
> "I will never purchase another product that says Seiko because of not knowing

> what I'm getting. I will pass the word around to my friends also." S.H., Danville, New York
>
> "All of this has left a sour taste in my mouth about Seiko. I know that they are good watches, my experience teaches me that, but it seems one can't rely just on the Seiko name. One must research where the particular watch came from, is it made for the American market or is it made for the foreign market, is the warranty service local thru Seiko or must one ship it off to New York without knowing anything about who is working on it, when will it be returned or how much will it cost?" T.M., New York, New York

For the working parent who has work and home responsibilities, the trademark means being able to quickly grab Johnson & Johnson Baby Shampoo off the shelf at the local drugstore and be confident it will be the product he or she has come to depend on.

For the vacationer who wants to rent a motorboat to take the family water-skiing, the trademark means having the confidence that the Brunswick motor has been safely installed in the boat by Brunswick's standards.

For the photographer, the trademark means being able to invest in a Hasselblad camera with the confidence that it is calibrated properly, that the instructions are in English, and that the warranty will provide factory authorized service in the United States.

Tragically, the existence of the gray market means the U.S. consumer cannot be so confident. Because gray market goods appear identical to well-known brands, without a careful and educated inspection, consumers are unable to to differentiate one product from another.

The gray market version of Johnson & Johnson Baby Shampoo is manufactured abroad, typically in Brazil. Brazil requires Johnson & Johnson to use local ingredients. What is premier quality for consumers in Brazil is not what that busy working parent expects in a Johnson & Johnson shampoo in the United States. Frequently, the gray market bottle has fewer ounces, has no safety seal and has a "thinner" consistency than the U.S. manufactured product.

What the vacationer risks in renting a boat with a gray market Brunswick motor is a product that meets the specifications of the foreign market for which it was intended, but may not include the numerous safety features and safety instructions of the authorized product specifically designed to meet U.S. safety standards. The Mercury Marine Division of the Brunswick Corporation has received complaint letters indicating that some consumers have bought old or damaged products. In other instances, without the benefit of the company's training, Brunswick has found many gray market motors installed in a dangerous manner.

Gray market goods include virtually all types of consumer products. Well-known items such as Dial soap, Procter & Gamble detergent, Reach toothbrushes, Colgate toothpaste, Johnson & Johnson baby powder and shampoo, Pepsi Cola, Mercury outboard motors, are traded on the gray market, to name a few. Because gray market products bear trademarks identical to United States trademarks, however, unknowing consumers are not able to tell the difference before the purchase between a gray market product and a product marketed directly by a United States trademark owner and its authorized distributors. Unfortunately consumers find out about the differences after the sale.

Gray market imports are manufactured to conform with the laws and standards of the foreign countries in which they are manufactured and intended to be distributed. These laws and standards, including local content and labeling requirements, frequently differ from U.S. laws and standards, and result in a product that does not comply with U.S. safety requirements. The dangers of selling products in the United States when they were intended for sale in another country are present in a number of different industries. For example, gray market toothpaste has been found to contain unusually high fluoride levels. Such levels are produced for and sold in Latin America and elsewhere in the Third World, where water is not fluoridated. The same product is potentially harmful to U.S. consumers whose water supply is already fluoridated.

Cosmetic products containing red dye number 2, banned in the U.S., have been imported from Canada where red dye number 2 is legal. Heavy mining and construction equipment has been found lacking roll bars, seat belts, back-up alarms, or English-language instructions and warnings as required by U.S. law. Even when U.S. requirements are met, gray market products often contain different ingredients than those the U.S. consumer has come to expect from the authentic product; thus the consumer can unknowingly purchase a product that will cause allergic or other unanticipated problems. Soaps are formulated to be effective under different environmental conditions. For example, British water has a higher mineral content than water available in most United States metropolitan areas. Soaps also conform to a country's regulatory standards -- the Food and Drug Administration has certified some colorants and not others.

Gray market products also often do not comply with U.S. labeling requirements. The absence of proper labeling poses a risk to the health and safety of the U.S. public in several respects.

Gray market products often do not contain ingredient lists. This is often true, for example, with respect to bars of soap. The absence of such lists fails to warn people of the possibility of ingredients to which they may be allergic and need to avoid.

Moreover, gray market products often contain erroneous ingredient lists. For example, baby shampoo from Brazil has been mislabeled by gray marketeers in their attempt to comply with U.S. ingredient labeling requirements. This erroneous information may pose a threat to individuals sensitive to particular ingredients.

Manufacturers need to be able to track their products to ensure that they are used safely and to enable products to be located should a problem develop. The gray market, by operating outside of authorized distribution channels, makes it impossible for a manufacturer to locate its products if necessary. This problem has already caused significant danger to American children.

For example, in the early 1980's, Kransco Co., a toy manufacturer, marketed a product called the Fun Fountain. Because of a defect in the product's design, several children sustained serious injuries. After several consumer complaints, the Consumer Product Safety Commission investigated the problem and required Kransco to make available to all customers and retailers of the toy a device that ensured the product could be safely used. Kransco was also required to post signs at the stores to which it had sold this product warning customers of the danger. After Kransco complied with this order, gray market toys from France were imported. Because these toys were imported without Kransco's consent, Kransco had no means of determining where these dangerous products were being marketed and to whom the safety devices should be made available.

This incident illustrates the danger gray market products can pose. This is exacerbated when gray marketeers obliterate product codes used to trace products and to determine age and place of manufacture. Thus if a manufacturer found that a particular batch of its product was unsafe, it would have no means of identifying where the product had been distributed and whether the gray market product came from the contaminated batch.

There is clear evidence that the importation of gray market goods facilitates the manufacture and sale of counterfeit goods in the United States. In several instances involving cosmetics and baby products, counterfeiters both in the United States and in foreign countries have designed counterfeit goods to look exactly like gray market goods. Customs officials and retailers assume these counterfeit goods are gray market goods. In addition, many counterfeiters will mix counterfeit goods in with gray market goods in an attempt to disguise them.

A pilot study recently conducted by T. M. Huhn & Associates found gray market computer boards for video games linked to counterfeit boards; gray market automotive parts linked to counterfeit auto parts; and gray market cosmetics linked to counterfeit cosmetics containing ingredients prohibited for sale in the United States.

The National Consumers League feels that Congress should not wait until a child's injury is fatal or a senior citizen's allergic reaction is deadly before it enacts legislation to protect the public from gray market goods that pose health and safety risks to consumers.

The National Consumers League supports S. 626 because it will clarify the trademark laws and prohibit the importation of gray market goods. The legislation is critical if our trademark laws are to be effective in stopping the consumer confusion and deception inherent in gray market goods.

Executive Director
Lawrence T. Smedley
Washington, DC

National Council
of Senior Citizens

President
Jacob Clayman
Silver Spring, MD

925 Fifteenth Street, N.W. • Washington, D.C. 20005 • (202) 347-8800

STATEMENT OF

THE NATIONAL COUNCIL OF SENIOR CITIZENS

TO THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

APRIL 30, 1990

First Vice President, Dr. Mary C. Mulvey, Providence, Rhode Island Second Vice President, George J. Kourpias, Washington, DC
Third Vice President, Dorothy Walker, Detroit, Michigan Fourth Vice President, Everett W. Lehmann, Washington, DC
Secretary-Treasurer, Jack Turner, Detroit, Michigan General Counsel, Robert J. Mozer, New York

The National Council of Senior Citizens is a 4.5 million member advocacy organization with over 5,000 affiliated local clubs, concerne primarily with the welfare of America's senior citizens. Consumer fraud is of great and abiding concern to our members. We believe gray market goods are inherently fraudulent and even potentially dangerous. Therefore, we strongly support S.626, which would make it possible for consumers to easily detect gray market products.

The gray market depends upon consumer confusion and deception for its success. Manufactured abroad for foreign markets, these products almost always differ from U.S. authorized products. However, because gray market goods carry brand labels identical to well-known U.S. trademarks, consumers are unable to distinguish them from U.S. authorized brand name products with which they are familiar. In fact, consumer surveys suggest that U.S. consumers who buy gray market goods believe they are buying the U.S. trademark owner's product. Many shoppers are unaware that gray market products are on the shelves.

In this way, gray marketeers exploit legitimate consumer expectations of quality, reliability, safety and service that the familiar trademark represents. Gray market goods often do not meet these expectations for a number of reasons -- they are produced to foreign specifications and standards; use foreign materials different from those used in the U.S.; are old or discounted models; or may be damaged by improper handling or storage in transshipping. Many gray market goods have foreign language instruction manuals and lack U.S. factory-authorized warranty service. Although gray marketeers allege that their products have warranties, gray market warranties do not provide service by factory-trained technicians and consumers often must pay for service that would be free from an authorized dealer. Unsuspecting shoppers return home with gray market Dial and Zest soaps that lack the antiperspirant qualities of U.S.-manufactured products. Gray market Sony Walkmen are not tuned to U.S. frequencies and gray market Seiko watches are frequently damaged and obsolete.

No consumer should be allowed to make a purchase believing they are getting something they are not. However, the gray market is particularly troubling for senior consumers because many of these products do not meet U.S. health and safety standards thereby posing a potential health risk. For example, 50,000 units of Oil of Olay imported through the gray market were recalled because they contained Red Dye 2, legal in Canada but banned in the U.S. The danger of selling products formulated for consumption in other countries can be found in gray market toothpaste as well. Made for use where water is not fluoridated, gray market toothpaste has been found to contain unusually high fluoride levels and is potentially harmful to U.S. consumers whose water supply is already fluoridated.

Even when gray market products meet U.S. standards, they often contain ingredients different from those the U.S. consumer expects from their favorite, authorized brand. Thus, even the well-informed senior may buy a product that will cause an allergic reaction or other unanticipated health problem. Soap made for use in Great Britain is specially formulated for use in water with a mineral content higher than that in most U.S. water supplies. Similarly, the FDA does not certify all colorants found in soaps meant for sale abroad.

Improper labeling of gray market products also jeopardizes the health and safety of senior consumers. The absence of ingredient lists on some gray market soaps means senior shoppers may buy familiar products proven safe in the past, only to suffer an allergic reaction to the gray market one. Worse still, some gray market products display erroneous ingredient lists. For example, gray marketeers seeking to comply with U.S. labeling requirements have mislabeled baby shampoo from Brazil. This is the height of gray market consumer fraud -- a product both misrepresented as U.S.-authorized and health threatening to ingredient sensitive consumers.

These kinds of gray market consumer problems are real. They have caused New York City and states such as New York, New Jersey, Connecticut and California to consider legislation requiring warnings about the dangers of the gray market. Periodicals such as Family Circle and Good Housekeeping and well-known consumer columnist Sylvia Porter have published articles advising consumers to beware of gray market products.

The gray market leads to another type of consumer fraud -- counterfeiting. There is evidence that shows the gray market facilitates the manufacture and sale of counterfeit goods. Foreign and domestic counterfeiters have designed gray market "look alikes" -- counterfeit goods, particularly cosmetics and baby products, made to look like gray market goods so as to confuse customs officials, retailers and consumers.

Another issue of concern to us is the gray market's impact on American workers. The sale of gray market imports results in lost sales of authorized, U.S. manufactured products. Consumer disgust after purchasing a gray market product may lead them to stop buying certain brands altogether. Fewer sales of U.S. produced products means fewer U.S. jobs. In other instances, U.S. manufacturers with valuable trademarks can be literally driven out of business by the gray market. The U.S. operations of Charles of the Ritz is one such example of a company spending millions of dollars to stop the flow of unauthorized gray market imports to no avail. Eventually, the gray market comprised 30 percent of the U.S. sales of Charles of the Ritz products and the company was sold to foreign investors.

Its U.S.-based operations were closed, and 5,600 American workers lost their jobs.

Like a trap door in the marketplace, the gray market trades on the expectations of unsuspecting consumers and catches them unaware. S. 626 provides a reasonable alternative. It would not prohibit gray market imports, but would require that the trademark be removed from them. "Demarking" would protect consumers from being misled, and protect trademark owners from misuse of their property, while allowing gray market products to be imported. "Demarking" would assure that gray market goods are sold at lower prices, further helping consumers. We believe this is fair and reasonable legislation that addresses a serious problem. We urge you to report it favorably. Gray market products rely on consumer confusion and deception, a deception that can result in health and safety risks, particularly for senior citizens. We strongly believe that S. 626 is needed to protect America's seniors from gray market enterprises. We urge the committee to support this legislation.

Schenley
INDUSTRIES INC.
EST. 1907
12770 MERIT DRIVE. SUITE 600
DALLAS, TEXAS 75251
PHONE: (214) 450-6400

April 30, 1990

Committee on the Judiciary
United States Senate
Washington, D.C.

RE: Hearings on S. 626 before the Subcommittee on Patents,
Copyright and Trademarks

Dear Mr. Chairman:

My name is Michael S. Griesser. I have spent my entire career in the alcohol beverage industry and all of it with Schenley, importers of products ranging from DEWAR'S WHITE LABEL and PINCH Scotch, REAL SANGRIA. Our products represent a significant percentage of all the alcohol beverages imported into the United States each year. The purpose of this statement is to express Schenley's strong support for S. 626, and to thank Chairman DeConcini and Senator Hatch for making elimination of the gray market one of their prime legislative goals in the 101st Congress.

Mr. Chairman, unless S. 626 becomes law, our imported alcohol beverage industry will continue to be severely and unfairly damaged by those who gray market only its finest and most popular brands. The fact that gray marketers target only premier products proves once again that their intent is to take full advantage of our multimillion dollar advertising and promotion programs - - programs that, over the years, have created the image, cache and reputation for quality that attract brand-conscious consumers. This practice is commonly called "free riding."

The concept of "free riding" is permissible because of the U.S. Customs Service's peculiar interpretation of Section 526 of the Tariff Act of 1930. This section states clearly that it is unlawful to import foreign products bearing U.S. registered trademarks without the consent of the U.S. trademark owner. Yet, for the last 20 years, Customs has refused to enforce this provision except where the U.S. trademark owner is not owned by or affiliated with foreign owners of the same trademark.

It is important to note that the law does not require that Customs treat foreign affiliated U.S. trademark holders differently from others. The U.S. Supreme Court stated in the COPIAT CASE (K MART Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988), that the Tariff Act of 1930 was worded so ambiguously, the Customs Service is free to continue or reverse its practice of exempting foreign owned or affiliated trademarks from protection at the border.

The Customs Service cannot justify its distinction between independent and foreign owned or controlled U.S. corporations with regard to protection of trademark rights at the border.

In the alcohol beverage industry, both types of corporations spend hundreds of millions of dollars each year in the United States promoting and advertising their high value, trademarked products. In 1989, we spent over $34 million advertising and promoting DEWAR'S and PINCH, just two of our fine imports. Grey marketers spend virtually no money on advertising or promotion.

When a gray marketer attempts to devalue the advertising and promotional efforts of an independent U.S. trademark holder by importing and distributing the trademark holder's most popular brands, he is stopped at the border by Customs and his product is turned away unless the trademark holder gives his consent to the importation. Yet a foreign-owned or controlled U.S. corporation holding the identical trademark property rights can expect no help from Customs when a gray marketer decides to target their most successful brands.

Fortunately, the difference in the level of government protection provided to an independent U.S. corporate trademark holder and one that is foreign owned or controlled does not apply to a corporation's rights in real property, stock certificates, or bank deposits. Yet, a common sense analysis of this situation would suggest that registration of a trademark with the U.S. Office of Patents, Copyrights and Trademarks would signify some meaningful level of protection for that property right. Under current Customs regulations, this is simply not the case.

Customs' position is all the more disturbing when considered in light of the aggressive position the U.S. Government is taking around the world with regard to protection for intellectual property rights which include trademarks. The Government has utilized or threatened utilization of trade sanctions against foreign governments that do not have adequate intellectual property protection provisions in their law. The United States Trade Representative has compiled a list of Special 301 countries that are suspect in the area of intellectual property. Finally, the U.S. is fighting hard in the GATT Uruguay Round for stronger international standards for protection of intellectual property. None of this can be reconciled with Customs' position in support of the gray market.

CONSUMER CONCERNS

There are a number of reasons that the Congress, the Administration and consumers should be outraged at the way gray marketers do business in the alcohol beverage sector.

Gray marketers are not particularly concerned about the labeling or presentation of the products they import as long as the well-known brand name is easily seen by the consumer. As a result, important consumer information required by regulation to appear on the label in English will instead appear in a foreign language. Such foreign language presentation of mandatory label information is obviously illegal under the regulations of the Bureau of Alcohol, Tobacco & Firearms (BATF), the agency that governs the marketing of alcohol beverages at the federal level in the United States. However, neither Customs nor the BATF has the resources necessary to physically inspect every shipment of alcohol beverages that reaches U.S. ports.

Other gray marketers will attempt to comply with BATF marking and labeling regulations by using something called "strip" stamps or labels to replace information printed in a foreign language or prohibited by U.S.

Incorrect, shoddy, or incomplete labeling of high value imported alcohol beverages not only facilitates "free riding" on the authorized importer's investment in his brand, but also damages the brand in the eyes of the consumer. Any noticeable difference between the gray market product and that brought in through the authorized importer confuses, deceives, and disappoints the consumer who has been buying the product for years with the same expectations of quality, consistency and genuineness. In the worst case, the consumer sees a product that is labeled differently, or relabeled with strip labels in a way that makes it appear like a discard or a "second," and is sitting on the shelf next to a properly labeled version of the same product. The opportunities for confusion, doubt and distrust in a careful shopper's mind are obvious.

The fact that Customs refuses to prevent the importation of gray market goods makes agency detection of counterfeit goods in all categories more difficult. Gray market importations have been known to facilitate entry of counterfeit soaps, shampoos, perfumes and other personal articles that can pose a significant threat to the general health and welfare of the population.

While the alcohol beverage industry has no reason to believe there is an issue of counterfeit alcohol beverages in the United States, reports indicate that such problems have occurred in other major consuming nations. The United States should not consider itself immune to this threat.

Just as importantly, Customs' policy greatly complicates the BATF's task of tracing imported alcohol beverages back to the original importers of record for purposes of prosecuting regulatory violations or ordering the recall of a product.

S. 626 AS A SOLUTION

S. 626 is, in essence, a "demarking" statute. NABI has in the past, and does now, strongly support the concept of demarking as a solution for the gray market problem.

S. 626 would provide that, absent the consent of a U.S. trademark owner, no person may import into or sell within the United States any good that is manufactured outside the United States "if that good, or any label, sign, print, package, wrapper, or receptacle intended to be used upon or in connection with the sale, offering for sale, or distribution of that good" bears a trademark that is identical or substantially similar to a registered trademark owned by a citizen of the United States or a corporation or other entity created under the laws of the United States.

In the imported alcohol beverage sector, this would mean that the gray marketer would have to effect the complete removal of the trademark or protective label design from the bottle, neck labels, seals and closures. It would also require the removal of registered trademarks from all packaging and boxes accompanying the bottle and meant for consumer consumption.

It is important and only fair to note that this statute would not prohibit the importation of goods manufactured abroad bearing U.S. trademarks. It would simply not allow those goods to be imported until those trademarks had been removed in a permanent way. It would also serve to remove misinformation from the shelves of alcohol beverage retailers' around the country--misinformation in the form of gray market alcohol beverages labeled, packaged and presented in a way that was not intended for the United States market and that therefore confuses, deceives and disappoints the American consumer. The final result of passage and implementation of S. 626 will be fair and honest interbrand competition between authorized importers of alcohol beverages and a reliable source of safe, properly marked, quality alcohol beverages for all consumers to choose from. This proposal deserves the full support of the Committee, the Congress and the Administration.

Thank you for the opportunity to present our views in strong support of S. 626.

Very truly yours

Michael S. Griesser
Vice-President - General Counsel
SCHENLEY INDUSTRIES INC.

MSG/ma

STATEMENT OF
THE UNITED STATES TRADEMARK ASSOCIATION
IN SUPPORT OF LEGISLATION
TO AMEND THE LANHAM ACT
REGARDING GRAY MARKET GOODS
S. 626

SUBMITTED FOR THE RECORD

HEARING BEFORE THE
PATENTS, COPYRIGHTS, AND TRADEMARKS SUBCOMMITTEE
SENATE COMMITTEE ON THE JUDICIARY

APRIL 4, 1990

The United States Trademark Association (USTA), founded in 1878, is a not-for-profit association with a membership of over 2000 corporations, law firms, professional associations and others interested in the protection and development of trademarks. USTA's membership, which crosses all industry lines and includes both manufacturers and retailers, is united in the goals of supporting the essential role trademarks play in promoting effective commerce, protecting the interests of consumers, and encouraging free and fair competition. Because of its diverse membership and as a matter of overall USTA policy, the Association does not take positions on matters of public policy unless the underlying principles and functions of trademarks or the trademark system are involved.

USTA finds S. 626 to be necessary and timely, and pledges its support to help the Congress pass a bill that will resolve the gray market problem. The Association hopes this statement will assist in the crafting of a complete solution.

BACKGROUND

There are many competing policy and economic interests surrounding the "gray market," which have made this issue and its resolution extremely difficult. USTA believes that the time has come for such a resolution. As the United States seeks to improve its trade balance and competitive world position, it is clear that our nation must do all it can to protect intellectual property rights--including trademarks and service marks.

Trademarks and service marks are symbols that differentiate the goods and services provided or sold by one producer or merchant from the goods and services produced or marketed by others. Marks are protected because of their importance to businesses and consumers. Businesses rely on them to distinguish their goods from those of their competitors, and to build consumer loyalty for, and recognition of, their products ("goodwill"). Consumers rely on marks to identify and recognize the particular goods or services that have satisfied them in the past or that they anticipate will meet their needs and expectations. Marks guarantee certain standards of quality, provide a ready means of assuring accountability, and facilitate competition. Trademark owners, consumers and competition as a whole are adversely affected when a mark does not function as intended.

USTA believes the concept of "territoriality" of trademark rights--that the owner or registrant of a trademark in a given jurisdiction has the right to exclude others from using it, including others who may have the right to use it lawfully in other jurisdictions--is vital to protect consumers from confusion, mistake or deception; to safeguard the goodwill and reputations businesses build in their marks; to promote free and fair competition; and to protect American jobs. The Association, therefore, supports excluding gray goods from importation into the United States.

Gray goods may be defined as goods bearing a genuine trademark that are sold in a market other than that in which they were intended to be sold. Several different circumstances give rise to the gray market. Both the authorized and unauthorized goods may be produced abroad, with each being intended for sale in a different market. In another case, the authorized goods may be produced domestically, while the gray goods are produced abroad for sale in a non-U.S. market and are imported and sold in the United States. A further example is where both the authorized and unauthorized goods are produced in the U.S., with the unauthorized goods intended for sale abroad finding their way back to the domestic market. Despite these different circumstances, all gray market goods undermine the ability of a trademark to function as intended by the U.S. trademark owner.

Products that bear the same mark but are produced for different national markets can, and often do, differ for a variety of legitimate reasons over which the trademark owner has little control. Very often, consumer preferences vary. In addition, national laws and regulations governing product ingredients, standards and labeling may differ. Many times, local conditions or laws may require businesses to use locally produced or available components that, by their nature, are not identical from one country to the next.

Because products with the same trademark may vary when made in two different countries or for two different markets, when the products are sold in a market for which they were not intended they may hurt the trademark owner's reputation and goodwill and confuse the public as to the quality of the products, the extent of warranty service or the true origin of the goods.

The seller of these gray market goods has little or no incentive to maintain the goodwill of the mark and its ability to attract customers in the future. Its only interest may be to make a quick profit while "free riding" on the goodwill of the trademark owner. The gray marketer spends less time and effort to ensure the quality of the product and may provide little, if any, warranty or other service. Furthermore, he or she typically spends little on advertising or marketing the product. It is likely that the gray marketer may be able to sell the goods at a lower price (although there are many cases where the products are not sold at a lower price). But, the buyer may pay a heavy price in the form of a product that does not meet expectations or a product without adequate service guarantees. The consumer is deceived as to the true source of the goods he or she purchases, and the United States trademark owner is injured because of damage to the reputation of its mark, resulting in a loss of goodwill.

This loss in goodwill ultimately hurts the consumer. If a manufacturer has a reputation for producing quality products and is able to earn a premium for this quality due to the public recognition and reputation of its trademark, there is an incentive to produce quality products identified by that mark. But, if a gray marketer sells products of an inferior or different quality and diminishes or destroys the trademark owner's goodwill, there is less incentive for the trademark owner to produce high-quality goods. This situation violates fundamental tenets and policy objectives of the U.S. trademark system.

Even in cases where there is not a marked difference in the quality of the gray goods and the U.S. made goods, United States firms and their employees can be economically harmed when the importation of gray market goods is permitted. Employer-manufacturers invest large sums in advertising American-made products sold under a U.S. mark as well as in facilities and materials required to produce the goods. The importation of foreign made gray market goods erodes the value of this investment and harms the U.S. manufacturer. Since sales of the American-made product may be lost to the foreign made gray market product, and the demand for the authentic American-made goods may drop, jobs of American employees who produce such goods can be jeopardized.

CURRENT LAW

Current law provides a cumbersome, unsatisfactory approach to the gray market question. Under the Lanham Act, most plaintiffs in anti-gray market cases pursue a cause of action by relying on Sections 32 and 43(a). Section 32 protects against use of a trademark which is a reproduction, counterfeit, copy or colorable imitation of a registered trademark without the consent of the registrant, and which is likely to cause confusion, mistake, or deception of the purchaser. Section 43(a) protects against the use, in connection with the marketing of goods, of a false designation of origin, description or representation. Section 32 is applicable only to United States registered trademarks, but Section 43(a) applies to both registered and unregistered marks. In either case, the plaintiff must demonstrate that the defendant's goods are likely to be thought to have originated with, or to have been sponsored by, the true owner of the mark.

An evaluation of case law shows that courts determine each situation on a case-by-case basis, and that there is no clear standard to determine whether likelihood of confusion exists. Typically, however, the courts have first considered the quality of the gray market goods; for example, whether the goods are the same as those distributed by the United States trademark owner.

If the goods are not of the same quality, and are marketed under the same marks as those of the United States trademark owner, the courts have readily determined that there is likelihood of confusion and have prohibited importation and sale of the goods. If the goods prove to be of the same quality, the courts typically have examined the relationship between the United States trademark owner and the source of the gray market goods, and attempted to determine whether the United States trademark owner has established goodwill in the trademark separate from the goodwill symbolized by the mark outside the United States.

Section 42 of the Lanham Act allows a trademark owner to record its registered mark with the U.S. Treasury Department's Customs Service to prevent the importation of goods bearing a copy or simulation of the registered mark. In addition, under Section 526 of the Tariff Act, the United States trademark owner domiciled in the United States can prevent importation. Usually, therefore, a plaintiff who is the owner of a United States registration and domiciled in the United States will seek relief under both Section 42 of the Lanham Act and Section 526 of the Tariff Act.

Current Customs Service regulations allow gray market imports where there is an ownership link between the U.S. and foreign mark owners, or where the mark has been applied with the the consent of the U.S. mark owner. Customs Service's interpretation of the law was challenged as being incorrect in K Mart Corporation v. Cartier, Inc.. However, in May 1988, the Supreme Court basically upheld this interpretation except that it found the Customs regulation to be at odds with the Tariff Act in situations where the "the articles of foreign manufacture bear a recorded trademark or trade name under authorization of the U.S. owner," as in cases where the mark is applied abroad by an independent licensee. (The Customs Service has proposed a regulation to bar gray market imports in this latter situation.)

Understandably, Customs is caught in a conundrum. How can it know if something is licensed or produced by a foreign-related company? The net result of the Supreme Court decision in K Mart is that nothing, or everything, will be excluded. USTA believes that despite the existence of any relationship between the U.S. and foreign owner of the same mark, gray goods should not be allowed to be imported or sold in this country because this distinction is impractical to enforce and irrelevant in the marketplace. Therefore, USTA believes there is a need for remedial legislation.

S. 626

Legislation which would prohibit the importation of all gray market goods into the United States without consent of the trademark owner is necessary to resolve finally the gray market problem. As indicated at the outset of this testimony, USTA strongly supports S. 626 and its intent. The Association has a number of suggestions which it believes will strengthen the bill and these suggestions are offered in the spirit of "fine-tuning" the bill, and in no way should be considered a lack of support.

1. S. 626 does not address situations that arise when goods made in the U.S. for sale outside the country are reimported into the U.S. It is limited only to foreign-made merchandise. Very often, reimported goods can have the same characteristics as foreign-made gray market merchandise, such as different product qualities, ingredients or warranties based on local preferences or regulations. USTA believes that these reimported goods should be addressed in the legislation, so that the problems posed by the gray market will be totally resolved.

2. The bill seeks to create a new Section 52 of the Lanham Act. This section makes no reference to existing Section 526 of the Tariff Act or Section 42 of the Lanham Act. Absent reference to existing law, there may be a statutory conflict which could produce further litigation in this area. USTA suggests that a better solution might be to amend Section 42 of the Lanham Act, which already deals in part with the gray market, to state explicitly that anything in Section 526 of the Tariff Act which is in conflict is overruled. Alternatively, a direct statutory reference to both Section 42 and Section 526 of the Tariff Act should be included in any new section.

3. This legislation, like Section 526 of the Tariff Act, would apply only to citizens of the United States or corporations created within the United States. Section 42 of the Lanham Act applies to the owner of a registered trademark, regardless of citizenship. It has been observed by some that Section 526, enacted in an era of protectionism, violates our obligations of national treatment under the Paris Convention for the Protection of Industrial Property. USTA suggests that it is unnecessary to limit the scope of persons protected by S. 626, and that the better approach would be to bring the definition of persons into conformity with Section 42, i.e., the owner of a U.S. registered trademark regardless of citizenship. This approach seems particularly desirable at this time, when the U.S. Government, in the current round of GATT negotiations, is encouraging our trading partners to enact intellectual property laws which would give greater protection to U.S. citizens and corporations and remove discriminatory practices.

4. S. 626 would apply to marks registered on both the Supplemental and Principal Registers. But, under Section 26 of the Lanham Act, Supplemental Register marks are not entitled to the protection afforded by Section 42. For consistency, USTA believes that the provisions of S. 626 should also be limited to Principal Register marks, as there is no perceived advantage in extending protection to marks registered on the Supplemental Register.

5. There is a seeming inconsistency in the proposed legislation to the extent that Section (b)(1) addresses the owner of "an identical or similar" trademark, while proposed Section

(d) addresses goods that bear only "identical" marks. USTA suggests that this inconsistency should be resolved to include only "identical" marks. The inclusion of "similar" marks could lead to administrative headaches for the Customs Service, which is not equipped to determine the issue of confusing similarity of allegedly infringing trademarks. USTA, therefore, believes the question of importation of goods bearing "similar" but not "identical" marks would more appropriately be left to existing law governing infringement actions in the courts under Sections 32 and 43(a) of the Lanham Act.

6. Finally, and more in the area of "housekeeping," USTA believes that the new remedies, as created in the bill, are not necessary since adequate remedies are already found in the Lanham Act. Terms already defined in the Lanham Act such as "person" and "United States" need not be redefined. Conversely, terms like "foreign trademark," that are not otherwise contained in the Lanham Act, should be defined.

CONCLUSION

In conclusion, USTA applauds and supports Congress's efforts to seek a solution to the gray market problem once and for all. Such a resolution is important both to businesses and to consumers. USTA and its members will be pleased to work with the Congress in this effort.

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[illegible]

VAN MUNCHING & CO., INC.

1270 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10020-1798

April 30, 1990

Subcommittee on Patents, Copyright and
Trademarks Committee on the Judiciary
United States Senate

Gentlemen:

Van Munching & Co., Inc. strongly supports the passage of S-626 now in hearing before the Subcommittee on Patents, Copyrights and Trademarks.

The passage and implementation of S-626 will be fair and honest interbrand competition between authorized importers of alcohol beverages and a reliable source of safe, properly marked, quality alcohol beverages for all consumers to choose from.

We feel this proposal deserves the full support of the Committee, the Congress and the Administration.

Thank you for your support of this statute.

Sincerely yours,

Leo Van Munching Jr.

Leo Van Munching, Jr.
President

LVMJr/ps

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April 30, 1990

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents, Coyrights and Trademarks
United States Senate
SH-327
Washington, D.C. 20510

Re: Subcommittee Hearing on S. 626, April 4, 1990

Dear Senator DeConcini:

I strongly urge the passage of S626

We as a company spend millions of dollars building consumer brands, particularly for Glenfiddich Pure Malt Scotch Whisky and Frangelico Liqueur from Italy.

The fact that a Gray Marketer can bring any of our brands into the U.S.A. without the consent of the Trademark Owner, is a ridiculous situation. The Gray Marketers would not be interested in bringing in our products unless they knew that there was already a consumer demand for the product -- a demand that we created over many years and by spending millions of dollars. Gray Marketers should not be permitted to "reap profits" from products that somebody else developed.

We are also always concerned about "fake or sub-standard" products with our brand names on them entering into commerce in the U.S.A. Although this does not appear to have happened to any large extent yet in the U.S.A., other countries, and in particular Japan, are being confronted with this problem now.

Mr. Chairman, this is a serious problem for all products, not just those of the alcoholic beverage industry, and therefore I suggest that your Committee support the passage of S626.

Yours sincerely,

Derek H. Anderson

Derek H. Anderson
President

STATEMENT OF

THE AMERICAN FREE TRADE ASSOCIATION

before the

SUBCOMMITTEE ON PATENTS,
COPYRIGHTS AND TRADEMARKS,
COMMITTEE ON THE JUDICIARY

IN OPPOSITION TO S.626

THE TRADEMARK PROTECTION ACT OF 1989

Mr. Chairman:

This statement is submitted by the American Free Trade Association ("AFTA") in opposition to S.626, the Trademark Protection Act of 1989. AFTA strongly urges this Committee to support the interests of the American consumer and reject this proposed legislation.

AFTA is a trade association of independent American importers, distributors and wholesalers of parallel import fragrances, colognes, and health and beauty aids such as shampoos, soaps and other items commonly purchased in drug stores. Many of the Association's members are small businesses. They are located throughout the United States and employ hundreds of people. The members in turn supply other distributors, wholesalers and retail outlets which employ many thousands more. For example, one of the drug store chains supplied by Association members has 1,500 stores with many thousands of employees and annual sales in excess of $2 billion. Many of the Association's members have been in the parallel import business for more than a dozen years.

AFTA is a member of the Coalition for Competitive Imports, an ad hoc coalition of trade associations and individual companies which are independent American importers, distributors and retailers of parallel imports. The Coalition's membership includes, in addition to AFTA, the International Mass Retail Association, the National Association of Catalog Showroom Merchandisers, K mart Corporation, and Jewelcor, Inc.

If enacted, S.626 would prohibit future parallel importation. Proponents of this legislation claim that this is necessary to protect consumers and manufacturers. This is completely untrue. Parallel imports benefit consumers by increasing availability of important products and by providing price competition. Foreign manufacturers and their U.S. subsidiaries have championed this legislation in order to protect their ability to extract monopoly profits from the U.S. market. AFTA opposes this. We ask Congress to support competition and consumer interests by rejecting S.626.

What are Parallel Imports?

Parallel imports are genuine trademarked consumer products,[1/] such as fragrances, liquor, crystal, cameras, and watches, which are manufactured abroad and imported by indepen-

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[1/] The courts by virtual unanimous consent have adopted the view that parallel imports are genuine trademarked goods, since they do not copy or simulate genuine trademarked goods, and are therefore authorized under the Lanham Act. *Weil Ceramics and Glass, Inc. v. Dash*, 878 F.2d 659 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 156 (1989); *NEC Electronics, Inc. v. CAL Circuit Abco, Inc.*, 810 F.2d 1506 (9th Cir. 1987), *cert. denied*, 484 U.S. 851 (1987); *Monte Carlo Shirt, Inc. v. Daewoo Int'l (America) Corp.*, 707 F.2d 1054 (9th Cir. 1983); *Disenos Artisticos E Industriales, S.A. v. Work*, 676 F. Supp. 1254 (E.D.N.Y. 1987); *American Honda Motor Co. v. Carolina Autosports Leasing and Sales, Inc.*, 645 F. Supp. 863 (W.D.N.C. 1986); *El Greco Leather Products Co. v. Shoe World, Inc.*, 599 F. Supp 1380 (E.D.N.Y. 1984); *rev'd on other grounds*, 806 F.2d 392 (2d Cir. 1986), *cert. denied*, 484 U.S. 817 (1987); *Diamond Supply Co. v. Prudential Paper Products Co.*, 589 F. Supp. 470 (S.D.N.Y. 1984); *Parfums Stern, Inc. v. United States Customs Service*, 575 F. Supp. 416 (S.D. Fla. 1983).

dent American importers rather than by so-called "authorized" U.S. importers and distributors. Parallel imports exist only because the manufacturers, for reasons of their own, seek higher prices for their products in the United States than elsewhere in the world. They do this by creating wholly-owned subsidiaries in this country, designating those companies as the exclusive "authorized" importers and distributors for those products here, and refusing to sell to retailers who will not maintain the higher prices for the products.

The obvious result in a free enterprise, free trade market is that independent American importers can purchase the same products overseas at the world price, often even directly from the manufacturers' "authorized" distributors abroad. The foreign manufacturers' price differential for the U.S. market is so great that, even after paying shipping costs and U.S. Customs duties, the parallel importer can offer the identical articles for 25 to 40 percent less than the U.S. "authorized" distributor.

The result is a saving to American consumers amounting to billions of dollars a year. Another result is the availability of popular products to a much wider spectrum of Americans who do not live in the large cities where the "exclusive" authorized stores are generally located. A substantial American industry of importers, distributors, retailers and catalog-showroom merchandisers, with millions of employees, serves the tens of millions of American consumers who buy these popular, foreign-made products at the prices they would pay if they could shop for them abroad. The discount retail industry is responsible for total consumer sales of $130 billion a year, a substantial portion of which consists of parallel imports. It also makes an enormous investment in the goodwill of trademarked products through its own widespread advertising and marketing of these products.

Only importation of foreign-made products is involved here. American companies which manufacture only in the United States are not affected by parallel imports; nor are manufacturers which price their products the same wherever they are sold and thus do not discriminate against consumers in the U.S. market.

Furthermore, only genuine products are at issue here. Parallel imports are manufactured in the same plants as the "authorized" imports, and the manufacturer has placed its trademark on them just as it has on the "authorized" imports. However, in their campaign to stop parallel imports, foreign manufacturers often seek to create confusion in the public mind between parallel imports and counterfeits. This is a smokescreen. The Congress recognized this when it clearly distinguished parallel imports from counterfeits during enactment of the Trademark Counterfeiting Act of 1984.[2/] The merchants who sell parallel imports have just as much to lose from counterfeit goods as do the "authorized" distributors and dealers. Neither can afford to lose the confidence of the consumer in the genuineness of the products they sell. Indeed, as the Subcommittee so well knows, that is precisely the function of a trademark: to identify the source of a product.

Long-Standing U.S. Import Law and Policy Favor Parallel Imports

The law and policy of the U.S. Government have approved parallel importation for more than 60 years. The legality of parallel imports was reaffirmed in 1988 by the U.S. Supreme Court in K mart v. Cartier.[3/] Customs Service regulations, based upon the Tariff Acts of 1922 and 1930, allow parallel importation only under specific circumstances, where the foreign and U.S. trademark holders are the same company or under common ownership or control or where the U.S. trademark owner has authorized the placing of the mark on the product overseas.[4/]

[2/] See "Joint Statement on Trademark Counterfeiting Legislation", Congressional Record, October 10, 1984, pp. H12076-12080.

[3/] K mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988).

[4/] 19 CFR 133.21(c).

The logic of this long-standing Customs policy and regulation is unassailable. Without such a provision, a single, worldwide entity could bar the independent importation of its own products by simply registering its trademark here and demanding that the U.S. Customs Service exclude such imports, under Section 526 of the Tariff Act.[5/] The foreign manufacturer would then have monopoly power to control the price of its products in the United States and to discriminate against U.S. consumers by setting a higher price for that product here than elsewhere in the world.

The logic of the Customs regulation is fully consistent with long-standing antitrust policy and law. The primary purpose of U.S. antitrust laws as interpreted by the Supreme Court is the protection of price competition in the United States. A seller of goods should not be able to price his goods differently for different territorial markets and expect the government to enforce his discriminatory pricing upon successive buyers and sellers. Thus the Robinson-Patman Act[6/] prohibits discriminatory pricing in domestic U.S. trade. And, for the same reason, state "fair trade" laws, which had allowed manufacturers to fix the prices of their

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[5/] 19 U.S.C. 1526.

[6/] 15 U.S.C. 13.

products when resold by retailers, were invalidated in 1975 under Federal antitrust laws.[7/] Those who oppose parallel imports are seeking to have the U.S. Government now enforce in international trade a form of monopolistic price-fixing that has long been outlawed in domestic trade in this country.

The Customs regulation is also soundly based upon long-standing trademark law. There is no basis for the contentions of opponents of parallel imports that such imports somehow endanger the valuable intellectual property right in their trademarks. The flaw in their argument is that American trademark law has never permitted the holder of a trademark to control the price of his product once he has sold it[8/].

[7/] The Consumer Goods Pricing Act of 1975, P.L. 94-145, § 2, 89 Stat. 801.

[8/] Most courts facing the issue have held that trademark law does not reach the re-sale of genuine goods bearing a true trademark even though the sale is made without the trademark owner's consent. E.g. NEC Electronics v. CAL Circuit Abco, 810 F.2d 1506 ("Once a trademark owner sells his product, the buyer ordinarily may resell the product under the original mark without incurring any trademark law ability"). See Parfums Stern, Inc. v. United States Customs Service, 575 F.2d 416 (9th Cir. 1986); Olympus Corp. v. United States, 792 F.2d 315 (2d Cir. 1986), cert. denied, 108 S. Ct. 2033 (1988); Disenos Artisticos E Industriales, S.A. v. Work, 676 F. Supp. 1254 (E.D. N.Y. 1987). The Ninth Circuit U.S. Court of Appeals stated one key rationale for this conclusion in NEC Electronics:

> This country's trademark law does not offer NEC-Japan a vehicle for establishing a world-wide discriminatory pricing scheme simply through the expedient of setting up an American subsidiary with nominal title to its mark.

NEC Electronics, 810 F.2d at 1511.

There is no such trademark "right" in this country, and even the opponents of parallel imports concede that there is no such "right" in most other countries.

The foreign manufacturers' "intellectual property rights" argument is the same "free-rider" argument that manufacturers used in trying to sustain "fair trade" laws in this country, and that argument has been firmly rejected. The argument is no more valid in this case. There is no evidence whatever that the cost of advertising, selling or servicing trademarked imports in this country justifies the enormous manufacturers' price differentials which lead to parallel importation.

As in the case of our antitrust laws, the foreign manufacturers are in effect seeking a revolutionary change in U.S. trademark law, to be enforced at the border by the U.S. Customs Service, which is not available to U.S. manufacturers of trademarked articles.

The fact of the matter is that, if parallel imports were prohibited, the already unjustified price differential would only increase. There would be no competitive pressure to keep the foreign manufacturers from setting even higher discriminatory prices for the U.S. market.

One of the extraordinary ironies is that the foreign manufacturers are seeking in the United States a benefit which their own countries do not allow to U.S. manufacturers. All the major trading partners of the United States permit parallel importation, including the countries where most of the foreign manufacturers of parallel imports are headquartered: Japan, France, Germany, and Italy. Contrary to arguments made by opponents of parallel imports, parallel importation is not limited to members of the European Community or only within the borders of the EC.

Consumers Are Fully Protected When They Buy Parallel Imports

The foreign manufacturers of these products and their captive U.S. distributors contend that somehow consumers are "deceived" when they purchase parallel imports because those products may carry lesser warranty or service protection than the "authorized' items. This contention is entirely baseless. Moreover, whatever warranty or service problem the parallel import buyer may encounter when "authorized dealer" service is denied is in fact a problem created by the manufacturers themselves in defiance of U.S. law, and is in no respect created by the parallel importers, distributors, or retailers.

First and foremost, all the available evidence indicates that consumers are just as satisfied with the performance of parallel imports as they are with higher-priced, so-called "authorized" imports. This is only to be expected, since the products are made by the same manufacturers in the same plants and are identical in every respect except price.

An extensive network of Federal, state and municipal consumer protection laws and agencies, as well as private sector consumer "hotlines", already exists to handle any consumer complaints about defective products, from the Federal Trade Commission at the Federal level to state and local consumer protection bureaus in virtually every state and city in the United States and radio, television, and newspaper consumer spokespersons.

Under existing Federal law, the Magnuson-Moss Warranty Act[9/] and implementing regulations,[10/] manufacturers of consumer products sold in the United States are required to honor the written warranties they provide with their products unless they explicitly disclaim those warranties in writing. Thus, if a foreign manufacturer wishes to disclaim its warranty on products it does not intend to sell on the U.S. market, it has the right to do so by labeling those products. If the manufacturer chooses not to limit its warranty, it is required by Federal law to honor it. In addition, many state laws impose similar obligations on manufacturers.

Manufacturers or their "authorized" distributors and dealers who refuse to honor their warranties on the ground that parallel imports were bought from "unauthorized" retailers are

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[9/] 15 U.S.C. 2301, et seq.

[10/] 16 C.F.R. 700.

therefore violating Federal law, and the Federal Trade Commission should take legal action against them. They may also be subject to similar state and local action as well as private suits. By refusing to honor their warranties, the manufacturers are indeed creating a "consumer protection problem" with parallel imports, but their concern can hardly be taken seriously when the "problem" is created by their own illegal act.

There is ample economic justification for enforcing Federal and other warranty laws against the manufacturers. They have sold their products abroad at a profit, having calculated into their price some margin for repair, replacement or refund for defective products. If the product required repair in the manufacturer's own country or in some other country, the manufacturer would expect to incur the cost of repairing it. There is no reason for the manufacturer to escape that cost if its defective product is sold abroad and finds its way to the United States.

Nor can the manufacturer argue that requiring its "authorized" distributor in the U.S. to incur the warranty cost is somehow unfair to the distributor because the product was sold through parallel, not "authorized" channels. There is no unfairness whatever, since the "authorized" distributor is part of the same economic entity as the manufacturer. If the "authorized" distributor were not owned or controlled by the foreign manufacturer, there would be no parallel imports, since under those circumstances the independent exclusive distributor could have parallel imports barred from entry under Section 526 and the long-standing Customs regulation. Thus in the case of a defective parallel import, the warranty cost borne by the "authorized" distributor is in fact being borne by the manufacturer, just as it would have been if the defective product had been returned for repair in the manufacturer's own country or some third nation.

Moreover, warranty costs often amount to no more than two percent of the sales price. Yet the difference in price between parallel imports and the "authorized" product is between 25 and 40 percent. Obviously, warranty cost has no relationship to the manufacturers' price differentials.

The purchaser of a parallel import actually has a wider range of remedies than a purchaser from the "authorized" dealer. As stated above, he is entitled to warranty protection from the manufacturer, just as if he had bought the product from an "authorized" dealer, if the manufacturer has not disclaimed its warranty. Moreover, the purchaser can also look to the retailer from whom he purchased the parallel import for warranty services. All the consumer protection laws referred to above also apply to the discount retail seller of the product to the consumer.

In fact, most discount retailers, including all the retailer members of our Coalition (some of whom are the largest retailers in the U.S.) offer even more extensive warranties than the manufacturers. Many have a "satisfaction guaranteed" or "satisfaction always" policy. Parallel import distributors and importers in turn provide their own warranties to their customers.

There is no evidence whatever that, when the consumer seeks redress from the discount retailer, he receives lesser service than if he seeks redress from the "authorized" dealer or distributor. Both distribution systems generally rely on independent contractors to provide warranty repair service. At least one major retailer has found the repair service provided by parallel import distributors on a popular watch line to be far superior to the repair service provided by the "authorized" distributor.

The fact is that purchasers of parallel imports are well aware that they are buying genuine, trademarked articles at far lower prices than they would pay for them in the "authorized" retail stores. A survey of consumers, conducted in 1986, showed that, given the choice between a higher priced article with a manufacturer's warranty and the same article at a lower price but with the discount retailer's warranty, a large majority chose the latter.

Perhaps the most compelling evidence that there is no consumer protection problem with parallel imports is that sales of parallel imports continue to rise year after year. Clearly, this would not be the case if consumers were being deceived or confused by buying these products from price-competitive sources.

If manufacturers genuinely wish to protect American consumers, they have many options entirely within their own power: they can end their discriminatory pricing; they can label differently the products they do not intend to be sold on the U.S. market, for example by specifically disclaiming their warranties on such products; or they can honor the warranties which the placed on their products when they sold them, at a profit, abroad.

Conclusion

The parallel import business is entirely an outgrowth of the foreign manufacturers' two-tiered pricing structure. Congress should not intervene and protect the monopolistic practices these manufacturers once enjoyed in the U.S. Instead, Congress should endorse parallel imports as important components of our economy. The Supreme Court has recognized the importance and legality of parallel imports in its K mart v. Cartier decision. Foreign manufacturers are using this legislation to overturn the K mart decision and end competition and more than 60 years of customs policy and regulation. Congress should protect the consumers' interest and not the foreign manufacturers by encouraging competition through parallel importation and by rejecting S.626.

STATEMENT OF

THE COALITION FOR COMPETITIVE IMPORTS

before the

SUBCOMMITTEE ON PATENTS,
COPYRIGHTS AND TRADEMARKS,
COMMITTEE ON THE JUDICIARY

IN OPPOSITION TO S.626

THE TRADEMARK PROTECTION ACT
OF 1989

Mr. Chairman:

This statement is submitted on behalf of the Coalition for Competitive Imports (the "Coalition") in opposition to S.626, the Trademark Prevention Act of 1989. This legislation would ban all parallel importation, reversing more than a half century of U.S. law and policy as well as the U.S. Supreme Court 1988 decision in K mart v. Cartier. The bill will cause economic harm to American consumers by ending competition, and thereby increasing prices on popular, trademarked imports by billions of dollars per year. The bill will also severely jeopardize a significant U.S. industry, consisting of price-competitive, importers, wholesalers, and retailers, which employ more than a million U.S. workers.

The Coalition is an ad hoc group of companies and trade associations which are engaged in the importation and distribution of consumer products in the United States, including parallel imports. The Coalition consists of large and small importers, wholesalers, and retailers who seek to preserve parallel importation against the multiple challenges presented by the largely foreign-based manufacturers which oppose this form of free trade.

The Coalition's members include the American Free Trade Association, the International Mass Retail Association, the National Association of Catalog Showroom Merchandisers, K mart Corporation, and Jewelcor, Inc.

The American Free Trade Association ("AFTA") is an incorporated trade association of independent American importers, distributors and wholesalers of parallel import fragrances, colognes, and health and beauty aids such as shampoos, soaps, and other items commonly purchased in drug stores. Many of the Association's members are small businesses. They are located throughout the United States and employ hundreds of people. AFTA members in turn supply other distributors, wholesalers, and numerous, well-known retail outlets which employ many thousands more. Many of the Association's members have been in the parallel import business for more than a dozen years.

The International Mass Retail Association ("IMRA") is a trade association that represents over 140 major discount retail chain department stores doing business in all 50 states, the sales of which represent an overwhelming majority of the $130 billion per year discount retail industry. IMRA members collectively operate over 35,000 stores, provide jobs for well over a million Americans, and sell tens of thousands of products.

The National Association of Catalog Showroom Merchandisers ("NACSM"), incorporated under the laws of the State of New York in 1972, is a trade association representing approximately 2,000 discount retail stores, the annual sales of which represent approximately $10 billion. NACSM members include retailers which generate billions of dollars of annual sales. All use a catalog, showing brand name products, as a principal medium of advertising. They provide essentially the same services as their retail competitors and sell a wide variety of mass merchandised consumer products, many of which are made overseas by foreign manufacturers and imported into the United States, either by the U.S. marketing subsidiary of the foreign manufacturer, or by independent American importers. Catalog showrooms sell these imported consumer products at discount prices, substantially less than those at which the "authorized" dealers ordinarily sell the same product.

K mart Corporation ("K mart") is a Michigan corporation, with its principal place of business in Troy, Michigan. K mart is a mass merchandiser which operates more than 2,000 discount department stores throughout the United States. K mart offers consumers brand name and private label merchandise at substantial savings over the retail prices suggested by trademark owners.

Jewelcor, Inc. is a Pennsylvania corporation engaged in the distribution, among other products, of genuine trademarked watches manufactured throughout the world.

The Coalition endorses the separate comments filed by AFTA, IMRA and K mart in opposition to S.626. These comments reflect the Coalition's support for parallel imports and consumer interests above the interests of foreign manufacturers.

The Coalition strongly urges this Committee to reject the attempts by these foreign manufacturers to impose their special interest on our economy at the expense of the American consumer and to reject S.626.

Written Statement Submitted by the
NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS

In Opposition to S.626

TO THE UNITED STATES SENATE JUDICIARY COMMITTEE, Subcommittee on Patents, Copyrights and Trademarks.

United States Senate, Senate Dirksen Office Building, Room 226
Washington, D.C. 20510

April 4, 1990 - 2:00 P.M.

The National Association of Catalog Showroom Merchandisers (NACSM) opposes S.626.

NACSM conversely supports H.R.771 (a bill similar to S.B.2614, which was introduced into the 99th Congress) which would codify existing United States Customs Regulations.

NACSM

NACSM is a trade association incorporated under the laws of the State of New York in 1972. Approximately 2,000 discount retail stores belong to NACSM, which collectively have annual sales of about $10 billion. NACSM members range in size from retailers doing billions of dollars in annual sales, to small business with sales of several million dollars per annum. All use a catalog, showing brand name products, as a principal medium of advertising. They provide essentially the same services as their retail competitors and sell a wide variety of mass merchandised consumer products, many of which are made overseas by foreign manufacturers and imported into the United States, either by the U.S. marketing subsidiary of the foreign manufacturer (the "authorized" distributor), or by competing independent American importers (the "parallel importer").

Why We Oppose S.626

Catalog showrooms sell these imported consumer products at discount prices, substantially less than those at which "authorized" dealers ordinarily sell the same products. In recent years there have been numerous attempts by certain foreign manufacturers to prevent such consumer products from reaching the hands of "price cutting retailers" such as catalog showrooms. This challenge to competition from parallel imports culminated in the United States Supreme Court decision in the *Copiat* case. This case raised important issues for domestic and international trade. The Supreme Court's decision supported the United States Customs Service regulations that permit goods bearing a valid trademark to be imported without the consent of the U.S. marketing affiliates of the foreign manufacturers.

Catalog showrooms sell, or have sold and anticipate selling in the future, a variety of products purchased from parallel sources, that is from other than the authorized U.S. distributor, such as Japanese watches, cameras and audio and visual equipment, and European crystal and ceramics. They consider the term "gray market" a misnomer in describing such open and healthy competition in identical merchandise purchased from the same foreign manufacturer overseas. Catalog showrooms consider the potential competition from these alternate sources a very strong disciplining factor in the U.S. market that well serves their interests, and those of the ultimate user, the consumer.

NACSM is continually amazed that many of the companies attempting to prevent parallel imports also have retail price stabilization schemes in the United States controlled through the American subsidiaries of those foreign suppliers. For example, three (3) Japanese camera companies currently have minimum retail sell price programs, a fourth Japanese camera company, Minolta, was cited by the Attorneys General of a half dozen states, two summers ago, for attempting to limit sales of its Maxuum camera to a minimum resale price. Japanese camera manufacturers have been major supporters of attempts to discourage parallel imports.

For example, the Attorneys General of New York and Maryland settled a complaint against a Japanese audio manufacturer, Panasonic, for allegedly attempting to set minimum resale prices for its product in January of 1989. It should be noted that, at approximately this same time, Panasonic settled this case (agreeing to refund millions of dollars to consumers) it simultaneously terminated the sale of products of its Technics division to the catalog showroom. After settling this case, Panasonic announced yet a new minimum advertised price program. Any discount retailer that sells below the minimum allowed product on designated products is penalized by a disallowance of advertising funds.

NACSM believes that consumers, discount retailers, and all those that believe in unfettered open competition, owe a debt of gratitude to these Attorneys General who seek to prevent such acts within their borders.

For example, it was reported that another Attorney General's investigation of foreign manufacturers of audio and video products use of minimum retail prices was started last year. Reports to NACSM indicate that these companies are again foreign suppliers, mostly from Japan.

The potential of an alternate source of overseas supplies through parallel imports places some limits on how far these foreign suppliers can go in controlling product and price in the United States.

These are serious issues which raise deep concern about attempts to prevent parallel imports and their serious domestic competitive impact, as well as foreign trade implications far broader and more serious than the mere expansion of domestic intellectual property rights. A major issue in this entire debate is whether a foreign manufacturer can sell goods and put them into the free flow of international commerce, yet subsequently prevent domestic competition with its American marketing subsidiary. For in our experiences most often it is the United States marketing subsidiary of the manufacturer which objects to the "unauthorized" importation and sale of these goods in North America. Canada's highest court had already ruled that such imports are permissible[1] as have most other U.S. trading partners[2] even before the United States Supreme Court agreed in the *K-Mart v. Cartier* case.

To repeat, many of these problems are created by manufacturers of mass merchandised goods made overseas who sell nationally-recognized brand products throughout the fifty states. This is not an issue of American jobs, since, by definition, these are overseas goods

Competition From Parallel Imports

It was a marketing reality of the 1980's that brand consumer products sold in America are often made overseas and sold through mass merchandise channels of distribution. Parallel imports are only a portion of this international flow of products. By legal definition, such"gray market" concerns only goods sold abroad by affiliates of U.S. trademark owners, since American citizens owning U.S. trademark rights who are unrelated to the foreign manufacturer have an indisputable right to prevent importation. 19 C.R.R. 133; 15 U.S.C. 1526; 15 U.S.C. 1124.

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[1] Consumers Distributing Co. Ltd. v. Seiko Time Canada Ltd., File No. 18970 (Supreme Court Canada 1984)

[2] See Takamatsu, Parallel Importation of Trademarked Goods, A Comparative Analysis, 57 Wash L. Rev. - 433 (1982)

As Professor William Comanor, of the University of California Santa Barbara noted in his testimony today, analysis shows that virtually everyone, both opponents and proponents of parallel imports ("gray market goods") concede that the practice increases prices to the consumer.

NACSM strongly supports this basic intellectual framework for the proposition that international price discrimination against U.S. consumers should be recognized as an economic evil as a matter of national policy. Those who would change the rules of the game have not met their heavy burden of proof; to the contrary all available evidence suggests that prohibiting parallel imports is injurious to the consumer.

Proponents of parallel imports have offered a number of rationalizations for permitting suppliers to set the retail prices, including such arguments as "a free rider" problem, "product source certification" advantages, etc. However, current prevalent practices in the marketplace evidence the contrary.

The effect of lower prices encouraged by parallel imports is easy to document. However, the full extent of the savings to consumers cannot be so readily measured since the existence of such competition, even potentially, will already have a beneficial tendency to reduce prices of the authorized distributor (very often the wholly owned subsidiary of a foreign manufacturer). The potential competition from such "gray market goods" has a salutary effect on competition.

For example, catalog showroom companies report that in recent years prominent Japanese manufacturers reduced the price of many products sold in the United States to meet the competition of parallel imports. A few years ago, Seiko USA, the wholly owned subsidiary of the Japanese watch manufacturer, Hattori (the largest seller of watches in America and the world) refused to sell to catalog showroom companies who had lower (discount) retail prices. However, the alternative source of supply, parallel importation, resulted in catalog showrooms selling virtually identical products at much lower prices. Thereafter, Seiko USA recommenced the direct sale of watches to catalog showroom companies.

Seiko, in turn, has been an early and major supporter of the Coalition to Preserve the Integrity of American Trademarks (COPIAT). At one point COPIAT's letterhead showed that of its thirty nine (39) members, thirty six (36) were suppliers of foreign made goods, and three (3) were trade associations. *Copiat*, of course, was a prime mover in challenging the fifty year old regulations of the U.S. Customs Service leading to the United States Supreme Court decision upholding these regulations in the *K-Mart v. Cartier* case.

It is submitted that it is not rational national policy to adopt anti-competitive policies that often result in higher prices to American consumers under the rubric of our intellectual property statutes, at least until substantial evidence is introduced to prove that such legal monopolies should be extended to billions of dollars of mass merchandised consumer goods produced overseas by Asian and European manufactures.

It should be emphasized that although there is little legitimate controversy that parallel imports often lead to lower consumer prices yet those who would reduce competition were quick to seize the psychological high ground by providing the misleading epitaph "gray market goods" to the practice, thereby implying merchandise half way toward same undefined black market. The fact of the matter is that most major national consumer organizations oppose S.626.

Adequate Disclosure

The issue of consumer deception is also raised, but it is largely a red herring. First, competing "gray market goods" are often identical, made by the same foreign manufacturer in the same overseas plant. Second, any quality differences between the products imported by authorized and alternate importers for goods bearing the same trademark, are the fault of the foreign manufacturer who chooses to put identical trademarks on differing products. Third, we are dealing with products manufactured by the same firm, so the only other differences arise in the transshipment process, or in other products or services. In fact, it is the supplier that initially creates any such problem by applying the same trademark to two different products, and it is the manufacturers which can most easily label the product to disclose any differences in their products.

Ultimately this is a consumer issue of which price is a major factor. Free and open competition in the United States is the preferred in the economic channels of distribution. There has not been sufficient evidenced addressed to shackle such competition in the United States.

It is respectfully requested that Congress support the decision of the U.S. Supreme Court in the *K-Mart v. Cartier* case decided during the 100th Congress and adopt a law confirming the U.S. Customs Department Regulations that have been in effect for a half a century.

Summary

Consumers gain from lower prices. While the "authorized" distributors may not achieve the high returns from their marketing investment they would prefer, this is the process of competition. Particularly when it is foreign companies which are reaping an above competitive profit, banning parallel imports exacerbates our trade problems by allowing higher prices, which monies are returned to the overseas parent.

We believe it critical to recognize seven (7) factors in weighing the advantages of such international competition.

First, the parallel import (gray market) issue only arises, by definition, when the foreign manufacturer and the U.S. authorized distributor are related companies.

Second, by and large these products are all manufactured overseas and so this is not an issue of protecting U.S. industry. Even in those rarer instances where the goods were originally made in the U.S. and shipped overseas, they were made in the U.S., and so U.S. jobs are not at stake.

Third, the manufacturer (usually foreign) has received the profit it set on the manufacture of the product when it made the first sale of this merchandise in international commerce.

Fourth, the manufacturer has it totally within its own control to differentiate geographical markets, by using trademarks of differing description.

Fifth, parallel imports exist because manufacturers, for their own reasons (ordinarily to reap an above-competitive profit in U.S. Markets), set a price differential between worldwide prices and the prices their affiliate charges in this country.

Sixth, by seeking to control American markets, foreign manufacturers gain advantages contrary to the parallel import policy of virtually every U.S. trading partner and inimical to U.S. interests (both higher prices to consumers, and the potential of avoiding U.S. income taxes on the excessive profits).

Seventh, there is no compelling reason to reverse fifty years of legislative and judicial precedent interpreting Section 526 of the Tarriff Act of 1930, 15 U.S.C. 1526, as confirmed by the United States Supreme Court in its May 1988 decision in the *Copiat* case.

American importers provide an obstacle to price control of U.S. markets because they can purchase identical merchandise overseas at the competitive price and ship and sell these goods, often with their own superior warranty, at prices well below what the manufacturer's affiliate prefers to charge in North America. The major consequence of such free and open competition has been lower prices of billions of dollars a year to American purchasers.

It does not contribute to the efficient allocation of resources in distribution of supplies throughout the economic channels of distribution for the United States, alone among the major U.S. trading partners, to "legitimize" geographical price discrimination of foreign manufacturers through a concept of a separate "territorial" submarket for the same trademarked product placed into international trade.

Recommendations

In reviewing present legislative intent, after fifty years of Congressional acquiescence in the interpretation by the U.S. Customs Service, we respectfully argue that it was not inappropriate for the U.S. Supreme Court to take judicial notice of some of the harm Congress may have considered in initially refusing to ban parallel imports a half century ago. This is truer today than every before. Preventing "unauthorized" imports encourages what has been documented as higher prices to U.S. consumers of up to thirty percent (30%) of forty percent (40%) for the identical merchandise. *Copiat v. U.S.*, 598 F Supp 844 (DDC 1984).[3]

Professor William Comanor, in his testimony of this date, notes that both potential and actual competition promote lower prices to United States consumers. He provides examples of Seiko watch sales as a good example. Many others exist.

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[3] The District Court opinion in the Copiat case referred to such percentage differentials in retail price for the same merchandise; the public record submitted to the U.S. Customs Service pursuant to 49 Fed Register Notice 99 (5/21/84) provides similar information; see particularly the submittal of the National Association of Catalog Showroom Merchandisers - Sept. 1984.

The Potential to Avoid U.S. Income Taxes

Wholly owned American subsidiaries, who have the exclusive right to distribute such products in the United States, because of the absence of any U.S. competition, have the power to set wholesale prices to such a level as to avoid virtually all income tax on U.S profits.

Those foreign manufacturers, which can control the channels of distribution for parallel imports thus achieve the potential to avoid U.S. income taxes. This is made possible by charging an arbitrarily high wholesale price to wholly owned U.S. marketing subsidiaries, thereby shifting the excess gain earned in this country to an obscure earlier portion of the transaction.[4] Thus, there seems an added "tax-saving" incentive for foreign manufacturers to stop the price discipline provided by alternative sources for these goods.

To the extent that these excess profits can be moved to an earlier phase of the transaction by increasing the wholesale price charged by the wholly owned U.S. marketing subsidiary of the foreign manufacturer, there is an additional consideration for U.S. policy in that there can be avoidance of the U.S. income tax on the excess profit. U.S. transfer tax provision under IRC seem particularly inadequate to deal with this problem for product lines such as audio/visual electronic lines which are dominated by Japanese manufacturers. See Kelly, "An Overview of the Influx of Grey Market Goods Into the United States.

The Manufacturer Claims

Catalog showrooms express skepticism when opponents of such unauthorized imports call them "gray market goods" and stress the "unauthorized" nature of such sales, alleging misrepresentation as to the manufacturers' warranty, etc. In examining claims for special protection for trademark territoriality of parallel imports under intellectual property rights statutes, we respectfully suggest that it is useful to adopt the approach most noticeable in antitrust cases, in refusing to allow purported characterization or label classification to override market realities.

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[4] For general judicial recognition of the ability of foreign manufacturers to set different prics than those paid by independent American importers see *F & O Trading Corp. v. U.S.*, 580 F 2d 414 (1978); *Hamrick v. U.S.*, 585 F 2d 1015 (1978). See also Kelly, Richard B., *An Overview of the Influx of Grey Market Goods Into the United States*, Vol 11/12 North Carolina Journal of International Law & Commercial Regulation, 231 et seq (1986)

If the circumstances do not merit a monopoly granted under federal intellectual property laws, the goods should be sold with impunity. Simply put, there are limits to the need to restrict competition in order to encourage "creativity." We believe the present situation clear, since parallel imports are often identical goods made in the same plant by the same manufacturer. The presumption should be that if the creator of the product has made its first sale and earned its profit incentive, the moment of control has passed.

Trademarks and The Tariff Act

Section 526(a) of the Tarriff Act of 1930 provides that in the absence of written consent of a trademark owner, it is unlawful to import into the United States merchandise of foreign manufacture that bears a registered trademark owned by a citizen of, or by corporation or association created or organized within, the United States if filed with the Secretary of the Treasury in the manner provided by section 42 of the Lanham Act. Section 42 of this Act, 15 U.S.C. 1124, provides that no article of imported merchandise which shall copy or simulate a trademark shall be admitted to entry at any custom house of the United States. The Custom Regulations implement both Section 526 of the Tariff Act and Section 42. However, Section 42 has been construed to require the Lanham Act to apply only to merchandise bearing counterfeit or spurious marks that copy or simulate genuine trademarks. *Olympus Corp. v. U.S.*, 527 F. Supp 911 (EDNY 1985) (as discussed in the memorandum opinion of Judge Sifton). We believe this analysis wise.

Upholding U.S. Customs Service Regulation 19 C.F.R. 133 as an established element of the nation's foreign trade policy is to support over a half century of American trade experience. However, this will not, in itself, resolve all the ambiguity threatening open competition in international commerce for such foreign made merchandise. Only a definitive statement from this Congression of its intent will fully assure that the federal statutes be properly construed in *pari materia* and that parallel imports are permissible under all federal statues, including the Lanham Act and federal antitrust law.

We believe H.R.771 the means to achieve this desirable end.

It seems appropriate to note that in the *Vivitar* decision before the United States Court of International trade, Judge Jane Restani, after a scholarly and exhaustive review of the legislative and judicial history of the regulations, lastly noted:

> "Congress is best suited to determine whether the current balance in trademark rights in the international commerce is inappropriate."[5]

Furthermore, as noted above, it should be recognized that the governments of Canada, Japan, and Europe have refused to so protect manufacturers claiming "intellectual projects rights" at the expense of their own consumers. It appears a particularly inopportune moment to reverse fifty years of federal action, for the benefit of extra profits for foreign manufacturers.

A Solution for the Foreign Manufacturer

There does remain one very real solution for foreign manufacturers who perceive "problems" from the "gray market."[6] If the manufacturer cannot ban parallel imports, or prevent the use of the brand name, it has it solely within its own power to use different marks for overseas and for American markets. These foreign manufacturers alone control what marks they affix to the products they sell in Japan, Europe, the United States and elsewhere. The camera, watch or VCR can be designated Aco, Bco, Cco, etc. if the manufacturer wishes to designate intended separate geographical markets for its products. Then the consumer would readily know the intended market. But this is not

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5. *Vivitar Corporation Inc. v. U.S. et al.*, 585 F Supp 1419 (CIT 1984); see also *Vivitar Corp. v. United States*, 761 F.2d 1552 (Fed. Cir. 1985), cert. denied, 106 S.Ct. 791 (1986); *Vivitar Corp. v. United States*, 593 F. Supp. 420 (CIT 1984).

6. Federal law, the Magnusson Moss Warranty Act, 15 USC 2301 et seq provides for any requisite disclosure. The reality of the marketplace is that most grey market goods are mass merchandised products which have the warranty of the distributor with conditions equal to or greater than the comparable manufacturer warranty. This was recognized by the New York legislature, the first state legislature to pass a law specifically governing the subject. See McKinney's, New York General Business Law, Section 218(eee) which provides for disclosure that there is no manufacturer's warranty unless a retailer, distributor, importr or other financially responsible person provides such a warranty. A similar state law has been passed by the state of California (Assembly Bill 2735) Statutes of 1986, Chapter 1497.

often done because it is not often the real intent of these suppliers. We are well into a worldwide economic distribution system that cannot be ignored.

This "globalization" of markets, however, rests upon the economic assumption that the most efficient allocation of resources will be achieved without geographic price discrimination by sellers. Particularly when it is American citizens who are the intended victims of the scheme, it appears appropriate for the Congress to reaffirm its intent not to allow a diminution of competition in the distribution sector of our economy.

Conclusion

There are two factors in efficiently placing goods in the hands of consumers, production and distribution.

Development of trade is dependent upon the retail store as the ultimate distributor. The search for a more efficient allocation of resources in our open distribution system has led to a variety of intermediary, wholesales and innovative retailers such as department stores, chains, discounters, catalog showrooms, wholesale clubs, etc. They find a better way not only to display and sell the product, but to go back to a wide variety of domestic as well as international sources to purchase.

Any attempt to stifle such open competition is suspect.

Respectfully submitted,

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